IN THE

Supreme Court of the United States

October Term 1927.

No. 561.

MARK SKINNER WILLING, TRUSTEE, ET AL.,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

THE ISSUES AND THEIR DISCUSSION.

At the outset we wish to state the issues in this case as we understand them and to explain the consequent character and extent of this brief. The vital issue, as we view it, is between the conception of equity as a system of rigid forms and precise precedents and the conception of equity as a system of living principles, definite

in character but flexible in their application to each particular case of which the facts and circumstances bring it within their broad general scope. Petitioners' brief is confined to the discussion of two questions of jurisdiction, one equitable and the other federal, with only such regard to the facts of the particular case as is required by the formalistic view of equitable jurisdiction. Even for this purpose petitioners' statement of the pleadings and of the facts is in our judgment inadequate and misleading. It is our view that the jurisdiction of equity was established and has been developed to relieve the administration of substantive justice from the deadening effects of formalism and to deal with the realities of human relations and affairs.

The disagreement between the parties about the basis and nature of equity jurisdiction is fundamental. The petitioners visualize equity as a code of remedial forms which define and limit its jurisdiction. These forms of equitable action are assumed to exist in legal contemplation, as ideal entities empty of content, and no litigant can find redress for his misfortunes unless he can fit the facts of his case into one of those pre-established moulds. While this respondent is prepared to show that its case would meet even that formal test, our position is and always has been that the present question of equitable jurisdiction cannot be abstracted from the plaintiff's title to relief, and we are gravely in error if this court, any more than the Circuit Court of Appeals, can be persuaded to dispose of the jurisdictional issue as a logical abstraction apart from the realities of the case.

We therefore deem it essential to ask consideration by the court of the history of this litigation and the actual situation it presents at much greater length than petitioners have considered necessary under their theory

of the law. In our view, the existence of equity jurisdiction is clear if there is in fact a legal right, the present beneficial enjoyment of which is in fact prevented or obstructed by an unwarranted obstacle, for the removal of which there is no adequate remedy at law but for which there is an appropriate remedy in equity. This case has been fully tried; and while "the facts averred in the pleadings and established by the evidence," as recited in the opinion of the District Judge, are doubtless to be conceded in the discussion of the jurisdictional question, they can only be given their proper force and effect by a much fuller statement.

On the question of equitable jurisdiction we are challenged to declare the principles upon which we rely and to show that these principles have been recognized and applied in analogous cases. This seems to us to require an historical and critical analysis of the nature and development of equity as concise as is consistent with clarity but sufficiently comprehensive to meet the challenge of petitioners' brief, as well as a review of the more important analogous decisions in which these principles have been recognized and applied. The question of federal jurisdiction requires a similar review of the statutes and authorities, especially the cases in which the federal courts have recognized the existence of separable controversies.

We do not, however, stop with these questions of jurisdiction. This case has been fully tried in the District Court. There are no controverted issues of fact the determination of which can affect its disposition upon the merits. We therefore devote a substantial portion of this brief (pages 102 to 143) to the merits of this controversy, and we respectfully urge that this court follow the precedent set by it in *Sharon* v. *Tucker*, 144 U. S.

533, and direct the entry of such a decree as it deems appropriate. We shall frequently refer to that case in this brief. It is sufficient here to point out that it was a bill to quiet title which was dismissed in the lower court for want of equitable jurisdiction, but that this court, premising that "there was no substantial disagreement between the parties as to the facts," reversed the decree and remanded the cause

> "with instructions to enter a decree declaring the title of the complainants to the premises described in their complaint by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to said premises through their former owner."

Our argument is an affirmative argument, in support of which we have already presented in two courts many authorities which are completely ignored in the brief for petitioners in this court. They cite many cases to establish general propositions which we do not controvert or discuss, except to point out that they have no valid application to the case at bar and that language quoted must be understood in connection with its context. Where this is clear from the leading cases, we have not thought it necessary or helpful to analyze and distinguish the merely cumulative authorities cited in petitioners' brief.

STATEMENT OF THE CASE.

On February 15, 1923, the Chicago Auditorium Association, an Illinois corporation, brought its action in the Circuit Court of Cook County, Illinois, to remove, as an obstacle to the present beneficial use of its 199-year leasehold property and as a cloud upon its title, certain claims of the petitioners here as its lessors; and, in accordance with the practice approved by this and other courts, it brought in, as proper although not necessary or indispensable parties, the owners of the fee of the other tracts which had been leased to it under similar leases, and which were occupied by parts of the same building, erected by the lessee, and now obsolete, financially unprofitable and prospectively unsafe.

For more than five years this plaintiff has been appealing to the courts for the definitive relief to which we believe it justly entitled. Its first mortgage bonds for more than $800,000 mature in February, 1929. After the negotiations which preceded resort to the courts had proved futile, and it was seen that the differences between the parties were too profound to be settled without litigation, the Association received the assurance of Mr. Willing, then as now its principal adversary, that if a bill in equity had to be filed he would do what he could to expedite the hearing and obtain an early decision as to the rights of the parties under the ground leases. The undisputed testimony of Mr. Clinch, president of the Association, was that "he said he would do all he could to hasten a decision; would not put any obstructions in the way." (R. 255.) After the bill had been filed, Mr. Willing and his co-trustee answered, admitting that, as alleged in the bill, "they claim and as-

sert that the present building cannot be removed without a violation of the terms, covenants and conditions of the leases." (R. 169.) In the memorandum in support of their motion to remand the cause to the state court made in the Circuit Court of Appeals after that court had decided the question of equitable jurisdiction against them they said:

> "Our position always has been and is that no court has any jurisdiction on any theory; that the issue is one for business dealing, not for judicial determination." (R. 638.)

This case was removed June 13, 1923, from the state court to the District Court of the United States by certain of the defendants, citizens of New York, upon the ground that the record disclosed a separable controversy between them and the plaintiff. Motions to dismiss the bill for want of equity jurisdiction made by various defendants were overruled by the court on the ground that the case should be first heard upon the merits after presentation of the facts. The written motion to dismiss made by the petitioners on that occasion gave as one of their reasons that the bill "is multifarious in that it joins as codefendants with these defendants persons not interested in or with respect to the so-called Walker leases." (R. 137-8.)

Nevertheless, the same Willing defendants (the petitioners here) then moved to remand the cause to the state court on the ground that the cause of action set forth in the bill of complaint is "single and indivisible," and that the bill discloses "no separable controversy between the complainant and the defendants joining in the petition for removal." (R. 194-5.) After a full hearing the District Judge dismissed the bill without prejudice because in his opinion it did not come "within some head of equity jurisdiction." On appeal to the Circuit

Court of Appeals before Judges Alschuler, Evans and Page, that court unanimously reversed the District Court on the question of equity jurisdiction, and sent the case back with directions "to hear the evidence and determine the issues involved." Certain defendants, including the petitioners, then filed in the Circuit Court of Appeals a motion for a rehearing and a motion to remand to the state court, both of which were denied, and the case has been brought here by writ of certiorari.

This suit was begun by the plaintiff in the state court against all the defendants interested in the Auditorium site, and according to the present position taken by the petitioners on the question of equity jurisdiction, plaintiff could not have brought separate suits against the different groups of defendants even if it had wished to do so. It stood neutral while some defendants removed the cause to the federal court, and while other defendants, at a time when the omens seemed to them unfavorable, strove to have it sent back to the state court. All the plaintiff has ever asked is an opportunity to be heard in any competent tribunal. Petitioners contend that "no court has any jurisdiction on any theory." We proceed to summarize the facts out of which this litigation arose.

The Chicago Auditorium Association was incorporated in 1886 (R. 198), with an authorized capital, as subsequently increased, of $2,000,000 (R. 199), and proceeded to acquire a site by leasing the necessary land from the owners of the fee, which was held in three separate interests. The property fronts east on Michigan avenue 187 feet, south on Congress street 361 feet, and west on Wabash avenue 161 feet. (R. 231.) The ground leases were five in number, all substantially alike in their pertinent provisions.

The land was vacant, and the lessee acquired the right to use it for any lawful purpose not prohibited by the leases, each of which merely required the lessee to erect and maintain upon the premises a substantial fireproof building of a stated minimum cost. It was commercial property near the business center of a great industrial city already conspicuous for its phenomenal growth. The lessors knew that the building then contemplated by the lessee was to be a combined hotel, office and auditorium building; and such a building was actually erected in accordance with the plans and methods then regarded as suitable for the purpose. Its size and character made the architect's problem exceedingly difficult and he did not solve it successfully. Modern steel skeleton construction was just beginning to struggle into recognition as the only sound solution of such a problem, and it was not applied to this building, which was structurally defective from the start, and is now a demonstrated failure. But the lessors say that the building, however unprofitable and structurally defective, must be maintained on the premises for over a century and a half to come unless the lessee will pay rentals largely in excess of those reserved in the leases, or will buy out the fee on the lessors' terms.

Two of the leases were from Wirt D. Walker of the land now owned by the Willing defendants, one from Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck of the land now owned by the Sears-Slater defendants, and two from the Studebaker Brothers Manufacturing Company of the lots now owned by the Chapin trustees, who are taking no active part in this litigation. All of the leases were dated early in 1887, and ran for 99 years from August 1, 1886 to August 1, 1985. The two Walker leases (R. 199, 200) named $420,000 as the value of the land, five per cent of which, or $21,000 per

annum was reserved as ground rent for the first twenty years of the term expiring August 1, 1906. The agreed valuation in the Peck lease (R. 200) was $193,500, and the annual rent for the first twenty years was six per cent thereof, or $11,610. The Studebaker leases (R. 201) reserved a ground rent of $3,600 during the same period. After August 1, 1906, all of the leases called for a ground rent of six per cent on appraised valuations to be made every ten years. In this respect the Studebaker leases stand as originally made, but the Walker and Peck leases have been extended and modified in the manner presently to be stated. The ground values assumed in the Walker and Peck leases were above rather than below actual market values in 1887. (R. 287.) The leases provided that the lessors should, at the end of the term, purchase the "buildings and improvements then on said demised premises" at an appraised value in no case exceeding what if anything they then added to the value of the ground if vacant. (R. 45, 62.)

The granting clause in each lease was an unrestricted grant of the use of the property for the term of the lease. Each of the five leases required the lessee to construct on the demised premises, "a substantial and solid fireproof building of brick, stone, iron, steel and tile, and such other materials as are necessary and usual in fireproof buildings in the City of Chicago," to cost not less than a specified sum, "said building in the character of the materials to be used in its construction to be as follows:

> "All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fire proofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick

> or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part." (R. 542-3.)

The minimum building cost under the first Walker lease was $475,000, under the second Walker lease $275,000, under the Peck lease $400,000, and under each of the Studebaker leases $50,000; making an aggregate required cost of $1,250,000.

On the five parcels of leased ground the plaintiff erected a massive hotel and office building, with a central theatre occupying part of each of the holdings. (R. 231.) It was completed about December 1, 1889 (R. 212) at a cost of over $3,000,000 (R. 273), part of which was defrayed by mortgages of its leasehold interests, and the balance by the subscribers for its $2,000,000 of capital stock. There are now outstanding $834,000 of its first mortgage bonds dated February 1, 1889 and due February 1, 1929 (R. 202, 205), and $541,000 of its second mortgage bonds dated February 1, 1892, and due February 1, 1942. (R. 203, 205.)

Henry J. Willing, of Chicago, acquired the Walker fee March 17, 1890 for $475,000. (R. 199.) Likewise the Peck fee was conveyed February 2, 1889, for $232,000 to Francis A. Bartlett, trustee, of Boston, and William A. Slater, of Norwich, Conn. (R. 200.) In July, 1891, by agreements with the respective purchasers, the Walker and Peck leases were extended for an additional period of one hundred years until August 1, 2085, the revaluation clauses were abrogated, and the ground rent under each lease was fixed for the remainder of the term. (R. 200.) The rent of $21,000 then payable under the Walker (Willing) leases was increased to $28,500 until August 1, 1896, and to $30,000 thereafter (or more

than 42 per cent); the rent of $11,610 under the Peck lease to $14,000 from and after August 1, 1896. The Studebaker leases have not been extended, nor have the revaluation clauses been eliminated therefrom.

There are in all of the leases the ordinary covenants for maintenance and repair and for replacement in case of fire. There are no covenants expressly denying or permitting the substitution of a new "substantial and solid fireproof building" in case it develops that the one first erected does not comply with this description, or has become obsolete in character, financially unprofitable and prospectively unsafe. That such is now its condition, is alleged in the bill and established by the evidence.

Its assessed value for taxation has for some years past been $100,000. (R. 379.) It is in reality a burden on the land and on the leasehold. It furnishes no security for the ground rent. The new, modern, fireproof building which plaintiff proposes to erect immediately will furnish ample security for the ground rent. Plaintiff offers to give adequate security for the completion of the new building and to consent to other equitable terms. The lessors claim that, without their consent, the present worthless building cannot be replaced, and that if such replacement is attempted it will work a forfeiture of the leases. They demand an increase in the ground rental as the price of the removal of the obstacle or cloud which their claims effectively create, and the petitioners say by formal averment in this record that plaintiff has no remedy of any kind in any court—"that no court has any jurisdiction on any theory." (R. 638.) The lessee must proceed at once if it is to save anything of value under these leases. The lessee's equity in the Walker and Peck leaseholds is worth $2,738,000 if they can be properly improved

(R. 287); otherwise it is worth little or nothing. If the plaintiff is permitted to erect this new building, it cannot hope even then to realize the principal of its investment out of the value of its leaseholds under the present ground rentals, to say nothing of the loss of all dividends, except one of 1½ per cent, during the past forty years.

Judge Wilkerson, in his opinion in the District Court, gives a summary of what he styles "*the facts averred in the pleadings and established by the evidence,*" and as these facts are not disputed we respectfully refer to his recital on pages 545 to 548 of the printed record, from which, however, we quote the following passage, with confirmatory references to the record:

> "Because of fundamental defects in the construction of the building, it will continue to deteriorate and there is reasonable ground to believe that it will become unsafe. (R. 327.) It is impossible for engineers to make a definite forecast as to how many years will elapse before that stage is reached. (R. 366.) When that stage of deterioration shall have been reached it will not be possible to make the building safe and conformable to the municipal regulations except at a cost so great that the earnings from the building as reconstructed would not represent an adequate return upon the investment. (R. 323.) By reason of the fact that the masonry bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas do not afford adequate light for hotel and office purposes (R. 286); the finishing is old fashioned and out of date (R. 351); the elevators are inefficient and inadequate (R. 355); the plumbing, drainage and water supply systems are inadequate, antiquated and unsound (R. 354); the heating and wiring systems are inefficient. (R. 353.) In short, the building has passed into the class of old buildings which are being torn down in the central dis-

trict of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected. (R. 372.) The highest and best use of the property covered by the leases in suit, at the present time and for many years to come, is one involving the construction of a new building of greatly increased height and capacity. (R. 289). Any building adequate to these requirements would necessarily be a modern steel-skeleton structure carried to the maximum height now permitted by law and supported on caisson foundations. (R. 286.) The cost of such a building would be between ten and fifteen million dollars. (R. 236.) Plaintiff desires and proposes to remove from the Auditorium property the present building and to erect in its place an adequate, modern steel construction building at a cost of not less than ten million dollars, adapted for a hotel, auditorium and safety deposit vaults. (R. 236.) Plaintiff has under consideration plans for such a building (R. 236); and has assurances from financial institutions, that if its right under its leases to remove the old building and erect the new one can be established, the necessary funds can be procured." (R. 237-240.)

The bill of complaint, after setting out these facts in substance, and the desire and ability of the plaintiff to improve the property with an adequate building, avers (R. 28), that the defendants, or some of them, claim that the present building cannot be removed, even for the purposes of reconstruction and upon adequate security, without violation and forfeiture of the leases; that persons with whom plaintiff must deal in financing its proposed enterprise are fearful lest its prosecution would work such forfeiture; that these claims, fears and uncertainties have clouded the plaintiff's title to its leasehold estates and impaired their value and made them unmarketable; that plaintiff has no adequate remedy at law; and that said defendants have refused to consent to the replacement of the building by the proposed im-

provement, or to forego the claims which cloud plaintiff's title, unless plaintiff would agree to pay them large sums of money in excess of what the leases call for.

The bill of complaint prays specifically (R. 31) that the court will remove said claims and clouds from the leasehold estates and quiet and establish the title thereto with full right and power to tear down the building and erect a more valuable one on the premises upon giving such security as the court may direct, and will enjoin the defendants interested in the fee from asserting any forfeiture by reason thereof and from taking any steps to prevent removal of the building for the purposes aforesaid. (R. 32.) There follows a general prayer for equitable relief.

The active defendants, in their answers to the bill, reiterated their claim and assertion that any attempt of the plaintiff to wreck the present building with a view to reconstruction would have the effect of forfeiting the leases. (R. 169, 182, 183.)

The view of the District Court was that no matter how clear the rights of the lessee might be, or how inadequate its remedy at law, it has at all events no remedy in equity; and the meaning of the defendants' argument and of the District Judge's opinion is that plaintiff must maintain an obsolete, unprofitable and prospectively unsafe building in the heart of Chicago for a hundred and fifty years to come, without remedy of any sort, either at law or in equity.

ARGUMENT.

I.

EQUITABLE JURISDICTION OF THE COURT.

Plaintiff cannot begin even the preliminary financing of its $10,000,000 building enterprise until the doubts by which its right to rebuild is now clouded shall have been removed. The defendants do not like the characterization of those doubts as a cloud on title, but they cannot deny that those doubts do in fact deprive the plaintiff of the beneficial use of its property, and would in fact be dispelled by an appropriate decree of a court of equity. The burden is on them to show how or why equity is disabled from exercising its remedial powers in a case where its intervention is so sorely needed and would be efficacious. Our contention is and always has been that *when there is a legal right to the beneficial use of property, when obstacles prevent the present enjoyment of that right, when the decree of a court of equity would in fact remove those obstacles without violation of rights of private individuals or of any principles of public policy, and when the courts of law afford no adequate remedy, the jurisdiction of equity is complete.*

The main arguments against the jurisdiction of equity put forward by counsel or adopted by the District Court seem to us reducible to the following propositions:

1. That the bill of complaint lacks some essential feature of a bill to remove cloud on title, and that, unless definable as such, it does not fit into any one of the forms

of equitable action which comprehend and exhaust the remedial powers of equity.

2. That the lessors merely insisted on what they believed or claimed to be their legal rights, and that equity is powerless to intervene except for the redress of legal wrongs.

3. That the bill merely seeks a declaration respecting future rights not involved in any present controversy of which a court can take cognizance.

From all of which, the practical conclusion is drawn that plaintiff, though possessed of the legal right to the present beneficial use of its property, must forego the exercise of that right for a period extending as far into the future as this republic has existed in the past. The only alternative conceded is that plaintiff may begin to tear down the Auditorium Building and defend any action brought against it; this in face of the fact that even that first step could not be taken until the refinancing arrangements, which are impossible without a decree, had been made, nor until the building had been emptied of tenants and plaintiff's only sources of revenue had been thereby stopped for an indefinite period, and then only at the risk of losing its entire leasehold estate if the legal advice upon which it acted should prove to be mistaken.

What Is a Legal Right?

It is agreed that equity cannot act in this case except in aid of some legal right, but the conception of a legal right urged by adversary counsel and adopted by the District Judge seems to us to be the origin of a whole train of fallacies. This conception appears in the forefront of Judge Wilkerson's opinion:

"It is of course elementary that the court is with-

> out power to construe these leases unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. * * * The plaintiff must ask that the defendant be decreed to do something." (R. 551.)

There may be special departments of equity in which that proposition is elementary; certainly it is not elementary in the exercise of equitable jurisdiction as such. The rights claimed by plaintiff are obviously in fact denied and resisted in this particular case, but in any event the doctrine that a right is not cognizable by courts of justice unless controverted, if possessed of general validity for any purpose, pertains to the canons of the common law rather than to equity. Trustees are constantly applying to the court for instructions, not because the defendants disagree with them about the performance of their duties, but to protect themselves against the possibility of any such claim at some future time. In suits to establish title, or to remove clouds on title, equity regularly intervenes to protect the rights of a plaintiff about which no controversy exists. The owner of a title acquired by adverse possession, the evidence of which is not a matter of record and might be lost, is entitled to a decree establishing his title as against the holder of the patent title, even though such holder may have entirely abandoned the property. The jurisdiction does not depend at all on any adverse claim by the defendant. As was said by this court in a leading case on the subject:

> "The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. * * * As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title

> with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment."
>
> *Sharon* v. *Tucker,* 144 U. S. 533.

The right does not depend on its being controverted, and the relief accorded need not consist in ordering anybody to do anything. The whole theory of parties in equity is inconsistent with the proposition which we are trying to refute. In an ordinary foreclosure suit, parties are joined as defendants on the mere allegation that they have or claim some junior interest in the property. Such a defendant may file a disclaimer, but he cannot sustain a demurrer to the bill on the ground that it fails to show any assertion on his part of an adverse claim. The apprehension that he might make a claim, and the right of the plaintiff to the enjoyment of the property free and clear from any possibility of such claim, is all that is needed to enable the court to enter a decree against him.

The District Judge returns to this subject near the end of his opinion, where in slightly different form he restates his view thus:

> "Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. * * * Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity." (R. 562.)

The underlying conception is that a right is not cognizable by a court of equity without proof of a corresponding wrong. While the present case does in fact disclose such a wrong, consisting of unfounded asser-

tions made before suit was begun and reiterated in pleading and by argument during its progress, we do not believe that equitable jurisdiction is conditioned by the assertion or existence of any such wrong. The ownership of property includes a right to its beneficial use; that right is coeval with the ownership and does not come into being for the first time when somebody disputes it; and it is one of the ordinary and most useful functions of equity to render such a right available by the removal of obstacles to its enjoyment. The utmost that can be required is that there must be in fact a real obstacle to the free enjoyment of the right.

In *Gavin* v. *Curtin*, 171 Ill. 640, sustaining the power of equity to sell land on petition of a life tenant in order to prevent its loss and sacrifice, the court said:

> "The record discloses the defendant in error is possessed of a right, recognized by the general principles of municipal law, to enjoy during her lifetime an estate in the premises involved in the proceeding, and that her children, if any are born to her, will be legally entitled to receive and possess in fee the remainder in said property. * * * The right possessed by the defendant in error in this case is one which belongs to the purview of municipal law and comes within the scope of juridical action."

In *Fulwiler* v. *McClun*, 285 Ill. 174, the court disregarded its long-established rule against entertaining bills for the determination of legal titles, and removed as a cloud on title a doubt caused by a clause in the will under which complainant claimed, saying:

> "This was not a bill calling upon a court of equity *merely* to determine and declare a legal title, but it presented a case calling for the exercise of the jurisdiction of the court on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her. The court had juristion." (Our italics.)

Equity does not exist merely to compose quarrels. The enjoyment of the beneficial use of property is one of the subjects of its ordinary protection, without any rights of persons or property "which are actually controverted in the particular case before the court," and without any prayer that defendant be decreed to do something.

Grounds of Equity Jurisdiction.

The ultimate reason assigned by the District Judge for dismissing the bill, and one of the points heretofore most stressed by counsel, was that "the facts of the case must come within some head of equity jurisprudence." (R. 562.) This is an irreproachable maxim when rightly interpreted, but we think it a grave error to picture equity as a congeries of stereotyped forms of action outside of which its remedial powers cannot operate. The issue thus raised goes to the very foundation of equitable jurisdiction. History brings out in clearer relief than any argument could do the difference between tendencies in modern jurisprudence which accord with the true genius and sound traditions of equity, and those which, merely reflecting the opportunism of the moment, Professor Pomeroy thinks he detects in some of the code states.

Original Writs and Forms of Action.—A Retrospect.

During the Anglo-Saxon era, and probably for some years after the Conquest, ordinary courts of justice for the common people were composed of freeholders selected for the occasion, and a plaintiff commenced his suit when and as he pleased, stating his case in his own way without being tied to forms. The king reserved power to temper the rigors of the law in any particular

case through the exercise of the royal prerogative, often guided by the advice of his chancellor, who had custody of the king's seal. Persons of rank resorted to a different tribunal, known as the Curia Regis, which gradually drew to itself jurisdiction of all matters of importance, so that suitors to whom the old county or hundred courts had once been open freely and without formality were now obliged to resort to the king's court, and could do so only by special authority of the king's writ, issued in conformity with the strict practice of that court, which included the payment of a substantial fee. All writs out of the king's chancery commanded the sheriff of the proper county to summon the defendant to appear at a day certain, and each followed one of a limited number of forms, of which a complete register was kept in the office of the chancery. Where no writ existed, no action would lie. Justice in the common law courts was thus in many cases the slave of form.

1 Spence, Equitable Jurisdiction 62, 108, 226.

> "That an early stage in the history of law is marked by the greater relative importance of adjective law, and that, consequently, this department of the law is the first to become systematized, is a commonplace of legal history."
>
> 2 Holdsworth's History of English Law, (3d ed.) 244.

The tyranny of rigid forms did not grow up until after the conquest. Speaking of the reign of Henry II, Professor Holdsworth says:

> "It is not probable that an official register of writs was in existence at this early period. * * * The court is not fettered by precedents. It is both able and willing to act upon principles of equity that right may be done. It is clear, however, that

> we have attained one of the leading characteristics of English law. It consists of a number of distinct causes of action, each begun by its appropriate writ."
>
> 2 Holdsworth, 194.

The tendency of fixed forms to shackle the administration of justice was not peculiar to English law, but is to be found in all developed systems. Professor Samuel Williston, in a note in his edition of Stephen on Pleading, after a learned discussion of the evidence touching the origin of writs, says:

> "To attempt to trace them further may appear superfluous, yet it may be observed that one of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate formula of complaint or claim. * * * Whatever the object, it is certain that such was the practice of ancient Rome, and that, from a period almost as early as the introduction of the laws of the twelve tables; and so severely were these formulae observed, that any deviation from them was fatal to the cause."

The primacy of form over substance, from which all developing peoples have found it so hard to emancipate themselves, attained its maximum in early England.

> "The history of civilized jurisprudence can show nothing of the same kind comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established."
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> 1 Pomeroy's Equity Jurisprudence, (4th ed.) Sec. 16.

As the original writs congealed in fixed forms, the king's chancery endeavored to temper their rigidity,

thus exciting the jealousy of the commons and leading to some relief from Parliament. By the statute of Westminster it was provided that where a writ for one case was found, and none for a similar case, a writ for the latter might be framed by the chancery *in consimili casu cadente sub eodem jure*, but the discretion thus conferred was extremely limited.

> "The common law had, as we have seen, grown up round the royal writs. They formed the ground plan upon which the builders of the common law worked; and it was for this reason that the learning of writs was the first thing taught to students of that law. Seeing that the choice of a wrong or inappropriate writ meant loss of the action, this learning continued to be of the utmost importance to the practitioner all through his career."
>
> 2 Holdsworth, 512.

Sergeant Stephen, in his celebrated treatise, originally published in 1824, dwells on the effect of the narrow common law procedure upon legal remedies even in his own day.

> "An original writ (as already stated) was formerly essential in every case to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are even now considered as within the scope of judicial remedy, in the English law, but those to which some known original writ (when these instruments were in universal use) would have applied, or for which some new original writ, framed on the analogy of those already existing, might, under the provisions of the statute of Westminster 2, have been lawfully devised. The enumeration of writs and that of actions have become in this manner identical."
>
> Stephen on Pleading, p. 8.

First Stage of Emancipation—Legal Fictions.

Every system of law, when it has enmeshed itself in rigid technical forms, endeavors to shake itself loose by various devices, the first of which in historical sequence is the resort to legal fictions. The process is graphically elucidated by Sir Henry Maine in his "Ancient Law," first published in 1861. The passages here quoted are from the handy edition in Everyman's Library, the editor of which says that the treatise "immediately took rank as a classic, and its epoch-making influence may not unfitly be compared to that exercised by Darwin's Origin of Species."

> "A general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted."
>
> Maine, Ancient Law, p. 15.

Lawyers of the present day will perhaps most readily recognize legal fictions in the figures of John Doe and Richard Roe, frequently to be seen in the pages of reports which must still be consulted for precedents. Plaintiff in ejectment perforce alleged a fictitious demise, which the defendant was not permitted to traverse. Such averments were familiar features in Roman law. For certain jurisdictional purposes a foreigner averred that he was a Roman citizen, and the allegation was not traversable. During the period of rivalry between various courts in the British realm such fictions enjoyed considerable vogue. A plaintiff who

wished to sue in the King's Bench or Exchequer instead of the Common Pleas would allege that the defendant was in custody of the king's marshal, or that he himself was the king's debtor and could not pay the debt by reason of the defendant's default, and neither court would suffer its jurisdiction to be defeated by a plea putting in issue the gratuitously false averment.

Maine, Ancient Law, p. 15.

The following passage from the Encyclopaedia Britannica contains a technical exposition of this singular hocus pocus.

"*Capias, latitat* and *quominus* are interesting as showing the extraordinary mass of fictitious allegation in the old procedure of the common law courts before 1832. By *capias ad respondendum* followed by *alias* and *pluries* the court of common pleas was enabled to take cognizance of an action without the actual issue of an original writ. The *capias* was a judicial writ issued to follow an original writ of trespass *quia clausum fregit*. The issue of the original writ and after a time the issue of the *capias* became mere fictions, and proceedings commenced with the issue of another writ called *capias testatum*. On return of the writ the plaintiff elected to proceed with a cause of action other than trespass, and the real merits of the case were eventually reached in this tortuous manner. After being served with the *capias* the defendant was bound to put in common or special bail, the former being sufficient in all but exceptional cases. Here again there was a fiction, for his common bail were John Doe and Richard Roe. The same fictitious pair also appeared on the side of the plaintiff as his pledges for the due prosecution of his action. By *latitat* and *quominus* the courts of King's Bench and Exchequer respectively assumed jurisdiction by a further series of fictions over ordinary civil actions. The writ of *latitat*, following the bill of Middlesex, itself in later times generally a fiction, alleged that the defendant was in hiding out of Middlesex, after committing a trespass *quia clausum fregit*, for

> which he was in the custody of the king's marshal in the Marshalsea prison. The real cause of action was then stated in what was called the *ac etiam* clause. The writ of *quominus* alleged that the plaintiff was the king's debtor, and that through the defendant's default he was unable to discharge the debt."
>
> 28 Encyc. Brit., (11th ed.) 849.

Reduced to intelligible terms, what has happened is this. The law had been that a simple creditor could not sue in the Exchequer; now he can do so, but must insert in his declaration the false averment about his being in debt to the king. The procedure has changed, but there is a taboo on any confession of change; hence superstition saves its face by a protestation known to everybody to be untrue. The psychological processes involved in this expedient are thus commented upon by Sir Henry Maine:

> "It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law."
>
> Maine, Ancient Law, p. 16.

Second Stage of Emancipation.—Equity.

The second of those agencies mentioned in Sir Henry Maine's work by which law is gradually adapted to the needs of society is Equity. In primitive days, before technical writs had narrowed the scope of the law, such equitable principles as received recognition at all were applied by the common law courts themselves.

> "The power of the king's justices to modify the

rigor of the law by applying to its interpretation the principles of equity, as distinguished from those of strict law, in certain cases, is expressly recognized by Glanville, and by Bracton; such modifications constituted a part of the *jus praetorium*, which was constructed by the common law judges."

1 Spence Equitable Jurisdiction, 126.

"In Edward I's reign the judges were not prepared to tie their hands too tightly. They were not prepared to abandon completely their claim to administer both law and equity."

2 Holdsworth, 333.

When the common-law judges were unable to meet an emergency, other agencies intervened. The king exercised a kind of equitable jurisdiction for mitigating the rigor of the positive law.

"In each nation, the prerogative appears to have been of imperial origin. Edgar's successors, Anglo-Saxon, Norman and English, continued to exercise this jurisdiction, which is the germ of the jurisdiction of the court of chancery."

1 Spence, 77.

If it had been possible for the chancery to multiply the forms of writs, the procedure might have been expanded to meet the growth and needs of the nation, but no such power existed.

"Although the chancery clerks decided in the first place upon the form and kind of writ in every case, and thus determined the species of action to be brought, this decision did not in the least protect or secure the plaintiff after he had commenced his action. When the action came before the common-law courts, the judges assumed and constantly exercised the power of determining the sufficiency of the writ; and if they held that it was not the proper one for the case, or that its recitals of facts or formulas were imperfect or mistaken, no attention was given to the prior decision of the chancery of-

ficials, the writ and action were dismissed, and the plaintiff thrown out of court."

1 Pomeroy, Sec. 21.

"Ultimately a distinct tribunal for supplying the deficiencies of the common law, and for correcting the rigorous operation of its rules and maxims in particular cases, established itself."

1 Spence, 127.

This was the court of chancery, which, as a separate tribunal, seems to have emerged near the close of the thirteenth century. During the reign of Edward II it was in full operation, and it became of great importance as a court of ordinary jurisdiction in the reign of Edward III, when it appears as a distinct court for giving relief in cases which required extraordinary remedies. This sovereign, about the middle of the fourteenth century, promulgated an ordinance referring to the chancellor, as keeper of the privy seal, all such cases as were "of grace." The jurisdiction thus conferred, unlike that of the common-law courts, was not restricted by conventional forms.

"From this time suits by petition or bill, without any preliminary writ, became a common course of procedure before the chancellor, as it had been in the council. On the petition or bill being presented, if the case called for extraordinary interference, a writ was issued by the command of the chancellor, but in the name of the king, by which the party complained against was summoned to appear before the court of chancery to answer the complaint, and abide by the order of the court."

1 Spence, 338.

It was about this time that the court of chancery ceased to attend the king and found a fixed abiding place at Westminster. Mr. Spence thinks that equitable doctrines would have perished if they had not been kept

alive in a separate court of chancery where procedure was not limited by any rigid forms.

> "Had not the clerical chancellors resisted with effect the introduction of the common-law system of pleading, much of the utility of the court would have been destroyed; this is one of the many advantages that resulted from the court having been founded by persons who took for their guide the principles of general jurisprudence, and looked only to the attainment of what they considered to be substantial justice."
>
> 1 Spence, 376.

Equity, however, did not escape the common tendency of all forms of creative energy to harden into mechanical processes and static institutions. Jurisdiction was declined in the present case by the District Court because "the facts of the case must come within some head of equity jurisprudence." (R. 562.) As an abstract proposition the statement is irreproachable, perhaps axiomatic; everything hinges on its application. While we expect to show in due place that the present suit would fit into any system of equitable forms of action, however hard and fast, if such system did in fact exist, we do not believe that equitable remedies have lost their saving virtue and settled into fixed moulds outside of which equity can afford no redress.

No one has done more to dispel such aspersions upon the powers of equity than the eminent jurist who, in view of a tendency which he detected in the code states to deny any peculiar virtue to equitable principles, has subjected them to a more exact analysis. He writes in his preface:

> "I need not dwell upon the disastrous consequences of the tendency above described if it should go on to its final stage. Even a partial loss of equity would be a fatal injury to the jurisprudence of a state. So far as equitable rules differ from those

> of the law they are confessedly more just and righteous, and their disappearance would be a long step backward in the progress of civilization."
>
> 1 Pomeroy, Equity Jurisprudence, p. xiii.

It was in the hope of helping the legal profession to preserve the salutary doctrines of equity from loss or diminution, that Professor Pomeroy undertook the critical examination of its underlying principles, which is the distinguishing feature of his monumental work.

Mr. Pomeroy's Analysis of Equity.

Counsel for the petitioners still call upon us (Brief, p. 31) "to classify the bill under any established principle"; not, however, they say "simply in order to affix a label or provide a caption," but in order that we may point out "what known principles of equity jurisprudence, if any, are applicable to enable a federal court of chancery to grant relief." While we fail, in the light of the succeeding arguments of the brief, to see any difference between what counsel disclaim and what they demand, we think some not infrequent misconceptions on the subject would be dispelled from their minds if they would follow Mr. Pomeroy's guidance. Support has been sought by them in certain passages of his work, especially one in which he says:

> "A court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of which do not bring it within some *general principle or acknowledged head* of equity jurisprudence." (Our italics.)
>
> 1 Pomeroy, Equity Jurisprudence (4th Ed.), Sec. 62.

In his preliminary chapter, in which this and similar language is used, the author has not yet embarked upon his analysis of modern equitable remedies, but is dis-

coursing of the genesis of what he calls *equitable primary rights.* What he means and says is that the creation of *these* has ceased, and that courts of equity no longer assume to enforce principles which appeal to their moral sense alone and have not won a place in established jurisprudence. The equity of redemption, the law of uses and trusts, the separate property of married women are equitable primary rights having no counterpart in the common law at all. The early chancellors, generally ecclesiastics countenanced by the king and at odds with the common law judges, were successful in enforcing recognition of many principles of this character, which have nothing to do with the law of remedies. With respect to them, there could be no question of the adequacy of legal remedies, because the rights themselves were wholly unknown to the law. Equity consists of two parts, new primary rights having no existence in common law, and remedies unknown to the common law for rights already recognized as justiciable. It is the primary rights unknown to the common law which Mr. Pomeroy, as shown by the authorities he cites, had in mind in the following passage, which was pressed against us in the courts below (Sec. 62):

> "Although the jurisdiction of chancery was originally based in great measure upon the omissions of the common law, the injustice of many of its rules, and its inability, from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice, yet since the equitable system has become fully established, and its principles settled, this *origin* of the jurisdiction is no longer regarded as furnishing the *real* criterion. The whole question by which the extent of the equity jurisdiction is *practically* determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate,—although the latter inquiry is still sometimes made and treated as though it were control-

> ling,— the question is, rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity." (Italics Mr. Pomeroy's.)

In other words, there must, at the present day, be a primary right, either legal or equitable, having a place in established jurisprudence, before equity can be invoked. A chancellor in the days of Edward the Third may have been able to create the equity of redemption as against a mortgagee whose title was absolute at law, or to enforce the recognition of uses and trusts out of good conscience, but a chancellor of the present day, however just he may deem it to protect an individual in his "right of privacy," or the public against the billboard advertising nuisance, does not feel at liberty to do so unless he can find a precedent in the now established body of equitable primary rights, or until the altered standards of a developing society necessitate innovation. With respect to these the *arbitrium boni viri* is no longer the accepted criterion, but rather the gradually formed body of principles and precedents upon which courts of equity have come to depend.

> "This accumulation became the storehouse whence the chancellors obtained the material for their decisions, and both guided and restrained their judicial action. When this time arrived, all assumption that the chancellor was to be governed by his own standard and conception of natural justice disappeared from the court of equity, and individual conscience was no longer the motive power in that tribunal." (Sec. 49.)

The main fallacy, however, which Mr. Pomeroy labors to dispel is the tendency among code lawyers to see in equity nothing more radical or important than a body of supplemental remedies.

> "No theory is scientifically complete, nor prac-

tically efficient, which does not recognize two distinct sources and objects of the equity jurisdiction, namely, the primary rights, estates, and interests which equity jurisprudence creates and protects, and the remedies which it confers. These two facts in combination can alone define the extent and fix the limits of the equity jurisdiction." (Sec. 133.)

One part of equity consists of primary rights wholly outside the purview of the common law. These are no longer evoked at the caprice of individual judges, and where they are involved no question can arise about the adequacy of legal remedies, because there are and in the nature of the case can be no such remedies. Another part of equity consists of remedies for the enforcement of legal rights. These remedies are devised by equity when and as needed, they are available whenever the remedy at law is inadequate, and they are not limited by any roster of fixed forms.

"The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use. * * * Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." (Sec. 109.)

Application of Mr. Pomeroy's Analysis.

The right which plaintiff in the case at bar asks equity to vindicate and make effective is not some strange primary right to be evoked by the chancellor out of his unfettered conscience, but is the lawful right of a lessee of vacant land to use it for any purpose not specifically

prohibited by the terms of the lease. Yet the petitioners still object, in the very caption of page 30 of their brief, that "the case set up by the respondent is not embraced within *any principle or head of equity jurisprudence.*" No such question can arise until a chancellor is asked to evoke out of the depths of his conscience a *primary right* which had no previous existence. Whenever the doctrine of "heads of equity jurisprudence" has been invoked as a supposed rule of decision, it will be found that the real trouble with the case was the absence of any primary right at all and not the inability of equity to protect or maintain such right if it really exists. The demonstration of this statement may appropriately begin with the following extract from Judge Wilkerson's opinion in the present case in the District Court (R. 561-2):

> "It is true that the absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties. But while this is true, yet the facts of the case must come *within some head of equity jurisprudence.* When a person brings an equitable action, he must maintain it upon some equitable ground. The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Before the rule as to inadequacy of remedy at law is applied, *some wrong must be shown* for which the plaintiff is entitled to redress. In other words, there must be a cause of action, whether resort is had to one forum or the other. A court of equity, by avowing that there is a right, but no remedy known to the law, *cannot create a right,* in violation of the principles of both law and equity. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity." (Italics ours.)

With due respect, we think the learned judge here set out to demonstrate the necessity of finding some conventional form of equitable action into which the plaintiff's case would fit, but that the argument glided insensibly, as the contention always must, into the mere assertion that there must be a right before equity can afford a remedy. If that were what he really had in mind, nobody would dissent from his conclusion.

The cases cited by Mr. Pomeroy himself in support of the passage quoted above from Section 62 of his work show that this was what he at least meant. His principal citation is the Vanderbilt case, in which application was made to a court of equity to cancel a false birth certificate. The vice chancellor, quoting the above passage from Pomeroy, dismissed the bill on the ground that it fell under "no recognized head of equity jurisdiction," adding that the plaintiff's remedy *"is either at law or else it does not exist."*

Vanderbilt v. *Mitchell*, 71 N. J. Eq. 632, 63 Atl. 1107.

Judgment, however, was reversed by the Court of Error and Appeals in an extended opinion from which the following are excerpts:

> "The absence of precedents or novelty in incident presents no obstacles to the exercise of the jurisdiction of a court of equity. The case presented is novel in incident, but not in principle; but it is no objection to the exercise of jurisdiction that in the ever-changing phases of social relations a new case is presented and new features of wrong are involved. * * * From time immemorial it has been the rule not to grant equitable relief where a party praying for it had an adequate remedy at law; but modern ideas of what are adequate remedies are changing and expanding. * * * Upon the whole case, we are of the opinion that the court of chancery has jurisdiction to afford the complainant ample and

complete relief, as already indicated in this opinion; that *should the court of chancery refuse relief under the circumstances stated in the bill it would cease to be a court of equity governed by principles of natural justice,* especially where property rights may be said to be threatened and personal rights are clearly invaded." (Our italics.)

Vanderbilt v. *Mitchell,* 72 N. J. Eq. 910, 67 Atl. 97.

Lord Justice Lindley, in the course of his opinion in *Holmes* v. *Millage* (1893), Q. B. 551, said:

"It is an old mistake to suppose that because there is no effectual remedy at law there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well known principles capable of great expansion; but the principles themselves must not be lost sight of."

The case was one in which the creditor of a nonresident newspaper correspondent sought to impound his future earnings by the appointment of a receiver. Relief was denied, not because of failure of the bill to comply with any procedural formula, but because the creditor had no right to his debtor's unearned salary.

The case of *Roberson* v. *Rochester Folding Box Co.* 171 N. Y. 538, 64 N. E. 442, grew out of the circulation by the proprietors of a flour mill of lithographs bearing the likeness of a young girl, who filed a bill for injunction claiming that she had been greatly humiliated by the scoffs and jeers of persons who recognized her portrait on the advertisement, and had been made ill and compelled to employ a physician because of these facts. In an elaborate opinion, from which three judges dissented, the Court of Appeals denied the existence of the alleged "right of privacy" upon which the bill was predicated; but the only question involved in either the majority or the minority opinion is about the existence of

the right of privacy, and not about the power of equity to protect it if it did exist.

Counsel now quote in their brief (p. 31) the following statement as made by this court in *New Jersey* v. *Sargent,* 269 U. S. 328:

> "It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief."

That language does, undoubtedly, appear in the opinion, but only as having been quoted with approval in *Georgia* v. *Stanton* from the previous case of *Cherokee Nation* v. *Georgia.* However, the statement is a self-evident proposition, and is in substance reasserted later in the opinion itself. The case was an original bill brought in this court by the State of New Jersey involving the right of the judiciary to invade the political department of government, and the bill was dismissed because no such right existed and because, as explained in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, it merely sought an abstract judicial decision where no rights of the plaintiff were shown to be affected either presently or prospectively.

Rees v. *Watertown,* 19 Wall. 107, is a case cited at various stages of this litigation, involving the efforts of a citizen of Illinois to collect a judgment against the City of Watertown, Wisconsin, on its defaulted bonds. As often as he got out a mandamus the aldermen resigned. Then he filed a bill to have his judgment made a lien upon the taxable property of the city. But the suit failed because the alleged right to a lien did not exist. The judgment creditor had a right against the city, but no right to a lien on the property of its citizens. The trouble with the case was much the same as that of the creditor in *Holmes* v. *Millage,* (1893).

Q. B. 551 above cited, who had a valid claim against the debtor but no right to a lien on his unearned salary.

Vassar College v. *Loose Wiles Biscuit Co.* 197 Fed. 983, furnishes another instance of a bill dismissed because of the absence of any legal right involved. Complainant averred a right similar to the "right of privacy," of which the New York Court of Appeals in the *Roberson* case denied the existence. The college sought to enjoin the defendant from selling and advertising "Vassar Chocolates" in packages adorned with the likeness of a young lady in scholastic garb with a mortarboard hat and other significant badges, but the court dismissed the bill on the ground that "individual conception of natural justice is not law," and because it was beyond the power of the court "to take cognizance of the psychological injuries recited."

We believe enough has been said to show that the idea of a limited number of equitable forms of action outside of which all relief in equity is precluded has no foundation in reason, common sense or law. It may be convenient for ordinary purposes of classification to have at hand a cabinet of standard labels, but our position is that no such catalogue can deprive equity of its fundamental and most valuable attribute of granting to persons who are being deprived of their lawful rights relief according to the exigencies of each case as it arises. There may be decisions in which a court, upon dismissing a bill, has stated, in broader terms than Mr. Pomeroy's view would warrant, that every case for redress in equity must fall under some definite head of equitable jurisdiction, but we do not believe any respectable decision can be found in which relief has been refused on that ground alone to a plaintiff who had a valuable property right of which he was losing the present beneficial use by reason of obstacles which equity, and equity

alone, could remove. The sense in which the phrase "some acknowledged *head* of equity jurisprudence" is used is shown by its constant association, either in the conjunctive or the disjunctive, with the phrase "some established *general principle* of equity." The doctrine of definite forms of action within which equitable relief must fall is not the real major premise in any judicial decision; it is invoked, when invoked at all, to fortify conclusions based on other reasons sufficient in themselves.

THE BILL CONSIDERED AS ONE TO REMOVE CLOUD ON TITLE.

While forms of procedure may be useful in equity as well as at law for purposes of description and classification, the title of the plaintiff to relief in this case is one of substance and not of form; nevertheless, we now proceed to consider whether the present suit can be catalogued, and if so how. If the bill must bear a label already in stock, our view has always been that the suit can best be described as one to remove cloud on title. Definitions, however, are arbitrary, and if anybody is moved to adopt some narrow description of a cloud on title which would exclude the obstacles actually existing in the present case to the plaintiff's enjoyment of the beneficial use of its property, we should be content to have this case designated as a bill *in the nature* of a bill to remove cloud from title; nor do we conceive that our fortunes in this court can be imperiled by the suggestion.

> "The jurisdiction to relieve the holders of real property from vexatious claims to it casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity."
>
> *Holland* v. *Challen,* 110 U. S. 15.

"The jurisdiction in actions to quiet title or remove cloud does not rest in arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion."

32 Cyc. 1308.

"Since the basis of this jurisdiction is to clear the plaintiff's title from claims which render it less merchantable, the question should not be whether a claim fulfills certain technical requirements, but whether it is of a character to frighten away the average purchaser. In other words, if the claim is of sufficient magnitude materially to affect the market value of the plaintiff's property it should be removed or its creation enjoined."

18 Harvard Law Review, 528.

"Whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest, *and he cannot immediately protect or maintain his right fully and completely by proceedings at law,* then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties." (Our italics.)

McArthur v. *Hood Rubber Company,* 221 Mass. 372, 109 N. E. 162.

"It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. * * *

> It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. * * * The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity."
>
> *Holland* v. *Challen*, 110 U. S. 15.

It has been seriously contended that, no matter how extreme the need or how complete the absence of other remedy, equity cannot remove a cloud unless it is on the fee of real estate, nor unless it involves the construction of a written instrument other than that through which the complainant derives title, nor unless it arises from some document which is apparently valid on its face, nor unless it consists of some matter of record removable only by extrinsic evidence, nor unless the adverse party has asserted his claim otherwise than verbally, nor unless the plaintiff has first established his right in the law courts, nor unless a variety of other conditions precedent exist, for all of which respectable authority can be found in cases where the circumstances warranted resort to the particular rule that was applied therein. Such limitations, each valid in its proper context or at some stage of the development of equitable jurisdiction, cannot in this year of grace deprive a court of chancery of power to relieve this plaintiff, which wishes to proceed immediately to improve its property, from adverse claims which effectually disable it from doing so and against which the law affords no remedy.

ALLEGED EFFECT OF ILLINOIS LAW.

Increasing stress appears to be laid upon the supposed effect of some alleged rule of Illinois law as a limitation on the equitable jurisdiction of the federal District Court. Indeed, the petitioners say in their brief (p. 38): "Our *principal concern* is that the Circuit Court of Appeals decided the question of equity jurisdiction contrary to the land laws of Illinois." (Our italics.) The argument seems to be (1) that the bill would not lie in the state court where it was brought; (2) that this state inhibition controls the action of the federal court; and (3) that petitioners are deprived of the benefit of the state law in being forced by their codefendants into the federal court. It is still insisted, in spite of Judge Wilkerson's view to the contrary (R., 552), that the Supreme Court of Illinois has narrowed the local definition of a cloud on title, and that this restricted definiiton by the state court is a part of the substantive law of the state which must be accepted by the federal courts as a local rule of property. The Illinois decisions do not support the premise of this argument, and if they did, the conclusion would not follow. The authorities only go to the extent of holding that a state statute *enlarging* the jurisdiction to remove cloud on title creates a substantive right which may be enforced in a federal court; they lend no countenance to the claim that state courts or even state legislatures can in any manner narrow the definition of a cloud on title so as to cut down the inherent jurisdiction of the federal courts with respect to the removal thereof. In *McConihay* v. *Wright,* 121 U. S. 201, which was a suit to quiet title, the court said with reference to federal equity jurisdiction:

> "That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United

States in its courts by the constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity; and no change in state legislation giving in like cases a remedy by action at law can of itself curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress."

The plaintiff in the case at bar invoked the jurisdiction of the state court in the first instance, and expects to show that it would have been entitled to prevail in that forum. It is not now relying on the state practice, however, but on that of the courts to which the case was removed. It is ready to litigate its rights in any forum where it can secure a hearing.

First, we take up the contention of counsel that the state law is of controlling effect, in support of which four decisions of this court are now cited. There is, however, no color for the claim that if the local courts or legislatures had excluded from their definition of removable clouds anything previously embraced therein, the jurisdiction of the federal court would be affected thereby. The contrary is the law, as shown by *Guffey* v. *Smith*, 237 U. S. 101, first cited in the petitioners' brief. This court did say in that case that the nature of the interest created by an Illinois oil and gas lease was determined by the laws of the state, and further that the local decisions governed the enforcement of such leases by *action at law*. In Illinois, ejectment cannot be maintained on such a lease when the lessee has not yet found any oil or gas, and this

rule would control the procedure in the federal courts, since it relates to remedies on the common law side. (p. 113.) The lease in question, however, gave the lessee an option to cancel it on payment of a nominal consideration. In Illinois, such a lease, though valid, is regarded as lacking in mutuality, and for that reason will not be enforced in equity. What this court actually decided is that the state law respecting remedies, though binding as regards actions at law, cannot narrow or circumscribe the equitable jurisdiction of the federal court, and that a federal court of equity will enforce such a lease regardless of state decisions to the contrary:

> "These decisions, it is insisted, should have been accepted and applied by the circuit court. To this we cannot assent. By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the federal courts, *sitting as courts of equity*, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting." (Our italics.)

The next case cited by petitioners is *Holland* v. *Challen*, 110 U. S. 15, from the opinion in which we have already quoted important passages, and which sustains the power of federal courts to administer this salutary jurisdiction with all remedies accorded by the state to litigants in its own courts; the exception indicated in other cases being that the state cannot, by its own legislation or decisions, deprive a defendant in possession of the property of his right in the federal courts to a jury trial when sued by a plaintiff out of possession.

Clark v. *Smith*, 13 Pet. 195, in which this court said that a state legislature has power to declare what shall be a cloud on title, was another case holding that an *extension* of the equitable remedy accorded by state legislature is available in a federal court.

The other case cited by petitioners on this proposition is *Pusey* v. *Hanssen,* 261 U. S. 491, where, as stated in the brief (p. 20), "the court was considering the availability of equitable remedies in federal courts as affected by local law." A certain statutory remedy relating to receiverships was held to be a matter of state procedure and not of substantive law, and hence not available in the federal court. In the opinion reference is made by way of illustration to statutes declaring something a cloud on title which theretofore was not, and to the recognized power of the federal court to administer such enlarged remedies as a part of the substantive law of the state. It would be a vastly different matter if a state should undertake to abrogate altogether the equitable jurisdiction of clouds on title, and if thereby, or by vritue of even less restrictive legislation, it were to be claimed that federal courts of equity were deprived of the inherent jurisdiction exercised by the English High Court of Chancery. These views were accepted by Judge Wilkerson in his opinion in the present case (R. 552), as against the adverse arguments then as now urged by counsel for the defendants.

Notwithstanding the view of the law as thus expounded we proceed to answer the contentions of counsel (Brief, pp. 21-27) about the treatment of clouds on title in the Illinois state courts. The Supreme Court of Illinois has been no less explicit than the highest tribunals of other states in declaring what was not, in particular cases before them, sufficient to sustain a bill as one to remove cloud on title. But it is one thing to say that an impediment of some particular sort is not one which, standing alone, equity will assume jurisdiction to remove, and quite another to say that equity cannot remove it as a part of the relief to which a suitor is justly en-

titled. With this distinction kept in view, we think it easy to show that the remedy sought in the present suit would have been accorded by the Illinois courts.

The Supreme Court of that state has frequently said that equity will not take jurisdiction *merely* to remove verbal claims or oral assertions of ownership as clouds on title, or *merely* to declare and determine legal titles.

Parker v. *Shannon,* 121 Ill. 452.
Seeley v. *Baldwin,* 185 Ill. 211.
Greenough v. *Greenough,* 284 Ill. 416.

Prior to 1911, Section 50 of the Illinois Chancery Act conferred express authority on courts of equity to hear and determine bills to quiet title and remove clouds from the title to real estate, whether occupied or unoccupied. The amendment of 1911 extended the jurisdiction of equity to the construction of wills even when no trust was involved, and to bills to establish and confirm titles to real estate. By this amendment the legislature probably thought it was abrogating the strict rule previously laid down by the Illinois court in such cases as *Harrison* v. *Owsley,* 172 Ill. 629, but if so, the legislative intention was frustrated by the courts, which still continued to apply to the statutory proceeding most of the strict rules already announced with respect to the removal of clouds on title. This result was achieved by the odd device of holding that a bill to construe a will, though expressly authorized by the legislature in all cases, would not be entertained unless the construction of the will was really doubtful. Thus, in the case of *Buckner* v. *Carr,* 302 Ill. 378, the court, after determining in a discussion of several pages the true construction of a will, decided that there was no such doubt about its meaning as to give the chancery court jurisdiction to construe it at all. This doctrine is more curious than im-

portant for our present purpose, which is to show that abstract rules promulgated as limitations on the jurisdiction of equity are no more applied by the Illinois Supreme Court than by other tribunals when a concrete situation discloses real ground for equitable relief. *McCarty* v. *McCarty*, 275 Ill. 573, rightly referred to in the brief (p. 21) as a leading Illinois decision, laid down the general doctrine of these decisions in broad outline, and is commented upon in a subsequent case as follows:

> "We held in the case of *McCarty* v. *McCarty*, 275 Ill. 573, that it was error for a court of equity to assume jurisdiction of a bill to construe a will which was neither ambiguous nor uncertain, where there was no equitable estate to be protected or equitable right to be enforced, *and no necessity for the exercise of any power of the court for the conservation, preservation, protection or betterment of the estate, or the settlement of any real controversy between the parties,* but where the bill was filed only for the purpose of obtaining a decree that contingent remainders had been destroyed and that the complainant had a legal title to the premises in fee simple. This is just such a case. There is no part of the will which is doubtful or requires construction." (Italics ours.)
>
> *Warren* v. *Warren*, 279 Ill. 217.

The significant comment on this line of decision is twofold: first, that the court, in laying down the rule, usually inserts the qualification that cases involving special equities will be excepted from its application; and second, that when such an exceptional case does arise the court in fact declines to apply the rule.

What the court really meant, and what it actually would do in such a contingency, is clearly shown in the significant case of *Fulwiler* v. *McClun*, 285 Ill. 174, decisive so far as the law of Illinois is concerned, in which

the facts are thus stated by the Supreme Court in its opinion:

> "The bill alleged that the premises consisted of a city lot and two brick dwelling houses which had fallen into decay; that one house was badly out of repair and did not bring sufficient revenue to pay taxes and assessments, and the other was incapable of being rented on account of its condition and was a nuisance; that the complainant had spent many thousands of dollars to keep the dwellings in repair and had exhausted her funds in so doing; that on account of the attempted limitation over to Elisha H., Robert and Edward McClun, her title was clouded and she was unable to borrow any money on the premises and had no other funds; and that the property would not produce income without the expediture of several thousand dollars, although it adjoined the business district of the city of Bloomington. The bill asked for a construction of the will and that the title of the complainant to the premises be determined and quieted. The court sustained a demurrer to the bill, and the complainant having elected to stand by the bill, it was dismissed at her cost."

The decision was reversed, and the bill sustained for the following reasons:

> "This was not a bill calling upon a court of equity merely to determine and declare a legal title, but *it presented a case calling for the exercise of jurisdiction by the court on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her.* The court had jurisdiction, and the doctrine of *McCarty* v. *McCarty*, 275 Ill. 573, did not apply to the case." (Our italics)

This decision has never been called in question, and if the present case had remained in the Circuit Court of Cook County, we thing it would be conclusive upon the jurisdictional phases of the present controversy, embodying as it does all the substance of the doctrines for which we contend. True, the bill asked for the con-

struction of a will; but the decision of the court, as shown by the language above italicized, did not base its affirmance of equitable jurisdiction upon that ground.

What we are concerned with is the logic of the Illinois Supreme Court when it differentiated *Fulwiler* v. *McClun* from those cases in which, after protracted discussion of the terms of the wills involved, the court announced that there was no question of construction sufficiently doubtful to bring the case within the operation of the 1911 amendment; that the bill must therefore be justified if at all under the original chancery jurisdiction; and that the suit must be dismissed as seeking merely a declaration of legal titles. Mrs. Fulwiler claimed legal title under the construction which she placed on her grandmother's will, and there is no suggestion that its construction was any more doubtful than that of the wills involved in the other cases.

Jurisdiction Not Defeated Because of Element Which Would Not Alone Support it.

Equity is not prevented from assuming jurisdiction of a meritorious case merely because it involves features which, when isolated, have been pronounced insufficient in themselves to warrant the exercise of jurisdiction.

Equity will not enjoin a criminal prosecution. But it is no less clearly established that in a proper case for equitable cognizance jurisdiction will not be refused because of the fact that its exercise involves an injunction against a prosecution for crime.

Truax v. *Raich*, 239 U. S. 33.
Terrace v. *Thompson*, 263 U. S. 197.
Packard v. *Banton*, 264 U. S. 140.
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497.

The mere illegality of a tax confers no jurisdiction upon equity to enjoin it, since the tax can be paid under protest and an action at law may be maintained to recover it, and hence no irreparable injury results from its collection. But where other equitable grounds exists the rule is no bar to the jurisdiction of the court, as where the tax is or will become a cloud on the title and there is no adequate remedy at law.

Ohio Tax Cases, 232 U. S. 576, 587.
Shaffer v. *Carter,* 252 U. S. 37.
Risty v. *Railway Co.* 270 U. S. 378.

Counsel nevertheless still insist (Brief p. 29) that the bill will not lie because it is "simply" to obtain a construction of the lease under which plaintiff claims. The principle we contend for is that equity will act whenever it encounters the conditions which we have pointed out as warranting the exercise of its jurisdiction, and that equity is not rendered impotent to afford relief in a proper case merely because some issue which would not alone confer equity jurisdiction has to be decided. We think Judge Wilkerson misconceived the nature of this proceeding when he said (R. 558-9):

> "Plaintiff's case as a suit to quiet title under the general usages of equity reduces itself to this: whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract."

But if there is in the present case a situation demanding equitable relief, and if the court in affording that relief were obliged to determine what is or what is not the legal effect of certain leases, it does not follow that

the same court could be called upon *merely* to construe the leases where the situation did not exist. This difficulty appears to us to be altogether imaginary.

Oral Assertion of Adverse Claim.

Another taboo which is alleged to forbid relief in equity is the rule that a cloud cannot be removed unless it consists in some written instrument requiring extrinsic evidence to show its invalidity, or, in the language of the District Judge, "a bill to quiet title will not lie to dispel mere verbal or oral assertions of ownership or interest." This we contend is one of those artificial distinctions which may be perfectly proper in the cases in which they have been drawn, but which have no application to a concrete case like the one now before the court. That equity has no inherent jurisdiction merely to construe deeds or interpret contracts is a proposition which may be accepted as axiomatic. That mere verbal assertions of an adverse claim are not enough, without further incident, to create a removable cloud, is a proposition generally true. What gives equity jurisdiction to construe deeds or contracts involving only legal titles is an actual emergency in which its aid is indispensable to assure to an owner the beneficial use of his property, and "mere verbal assertions" will not call equity into action unless they relate to a similar situation.

In *Thompson* v. *Emmett Irrigation District,* 227 Fed. 560, a holder of bonds of the district filed a bill alleging that the district disputed the validity of some of them, and that "by reason of such general vague and indefinite charges" a cloud was cast on the validity of all of the bonds, so that their market value was impaired. One ground for sustaining the bill was the enforcement of a

trust, but the opinion makes it clear that the court con sidered the bill sufficient independently as one to remov cloud on title. After discussing a well known New Yor case in which spurious bonds were canceled because the clouded the value of genuine bonds, the opinion pro ceeds:

> "If a court of equity, upon the suit of the cor poration, has jurisdiction, under the circumstance of the case cited, to cancel spurious stock as a clou upon the title of an owner of genuine stock, it seem clear that a court of equity under similar circum stances would have jurisdiction of a suit to deter mine whether illegal bonds have been issued by corporation, and, if so, by a proper decree to re move the cloud cast upon such issue and upon th title of the holders of the legal bonds of the cor poration, and especially must this be so where, as i the present case, the bonds are to mature serially and no bond will mature, or become due and payable until the first day of January, 1922, and until tha date no judgment at law can be obtained on any o the bonds determining their validity."

Another federal case in which, though the jurisdic tional question was not discussed, the court did in fac remove a verbal claim as a cloud on title in *Oman* v *Bedford-Bowling Green Stone Company,* 134 Fed. 64 The stone company owning part of a switch track acros its land filed a bill to quiet its title to the land and rail road tracks thereon, and to restrain the Omans from asserting any interest in the tracks (p. 65). It is clea from the opinion of the district judge that only verba claims and clouds were in question (134 Fed. 453). A decree in accordance with the prayer of the bill is af firmed and the Circuit Court of Appeals says with ref erence to the railway tracks:

> "They became the individual property of the ston company, applicable to whatever use it might pu them. But the Omans claimed the right to use them

as railroad tracks in the transportation of their freight. This was an assertion of an interest, not only in the track material but in the roadbed, of the right to have the tracks kept where they were and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the stone company."

Verbal assertions of ownership were held to be removable as a cloud on title in *Lovell* v. *Marshall,* 162 Minn. 18, 202 N. W. 64. The bill was filed by a bondholders' committee as owner of certain securities in which the defendant Marshall was alleged to claim an interest. The court said:

"It is urged that all the complaint alleges is that Marshall asserts verbally that he is the owner of the securities in question. * * * The term 'cloud' is indefinite. It is hardly possible to formulate an all-embracing definition or to lay down rules which will cover all the cases in which a court of equity may properly come to the aid of the complainant. A threatened act which will necessarily embarrass plaintiff's title may be enjoined, provided the danger is imminent and not merely speculative or potential."

In *Slegel* v. *Herbine,* 148 Pa. St. 236, 23 Atl. 996, a cloud removed by the court depended on the construction of a deed, which plaintiffs alleged to be void by reason of the breach of a condition subsequent therein. In its opinion overruling the usual array of technical objections the court says:

"No doubt there is not in this state, as there is in some others, any special jurisdiction conferred upon the courts of equity by reason of which they may be called upon to declare the construction of a deed or will or other instrument; nor, of course, will the *mere fact* that the proper construction of such is in dispute confer chancery jurisdiction, in the absence of some other recognized basis of equitable intervention. But it will scarcely be pretended that

> where a party has no legal remedy whereby to protect his property against the assertion of an unfounded or expired claim the established equity jurisdiction is ousted by the *mere fact* that incidentally it will be necessary to put a construction upon a written instrument. Such a doctrine would practically amount to a denial of the jurisdiction." (Our italics.)

If, however, the inability of equity to relieve against adverse claims resting in oral assertion thereof is a doctrine which cannot be maintained, we are next met with the contention that no adverse claim was in fact put forward by any assertion, even verbal, of which a court can take cognizance.

Affirmative Assertion of Adverse Claim Shown by This Record.

We have tried to make plain our position, that equity exists not only for the redress of grievances, but for the protection of rights, and that equitable relief is constantly given in cases where the plaintiff's right is not disputed by anybody. But were it otherwise, the present record affords abundant evidence of the assertion of adverse claim. This proceeding was not commenced until the lessors had rejected all overtures for an amicable adjustment of their differences with the lessee, and had explicitly refused to permit the Auditorium Building to be removed for any purpose whatever. The testimony on this point was that of R. Floyd Clinch, who conducted the negotiations as president of the Chicago Auditorium Association, and it was in no manner qualified or contradicted, although Mark Skinner Willing, with whom the final negotiations took place, was present at the trial. (R. 207.)

The first discussion was with the Sears-Slater trustees

who own the Peck fee (R. 241), and who reside in the east. They came to Chicago, and held conferences with Mr. Clinch. Mr. Adams, as counsel for those trustees, disputed the right of the Association to rebuild, which its counsel, Mr. Kales, as positively asserted. (R. 242.) The question was argued back and forth, the possibility of litigation discussed, and a suggestion made by Mr. Clinch about buying in the fee for the purpose of avoiding litigation. (R. 242.) Mr. Clinch said the Association could in no event buy the Peck fee unless it also got the Walker fee, then owned by the Willing estate. It was stated at the last of these interviews that if the parties could not agree there would have to be a friendly suit in equity. The Sears-Slater trustees said they would not give their consent to the plans for tearing down the building and putting up another (R. 263). They said they would not let the Association tear down the building for the purpose of putting up another. (R. 264.)

A few weeks later Mr. Clinch saw Mr. Willing and Mr. Cramer, the trustees representing the owners of the Walker fee. Mr. Willing disagreed with him about the right to rebuild without consent of the lessors (R. 242), and as to selling the fee, he mentioned a price which Mr. Clinch would not consider. Mr. Clinch told him that if they could not come to closer terms the only thing to do would be to bring a friendly suit in equity. Mr. Willing said he guessed that was the only thing that could be done, and expressed his willingness to do all he could to accelerate such a suit and bring it to a speedy conclusion. In the conversation he said he had consulted his attorneys, who told him the Association had no right to tear down the building. (R. 243.) Mr. Willing insisted that if a building was put up from which the Association realized more money it would

have to agree with him and his associates for the payment of a larger rent before taking the building down. (R. 254.) He said that if a suit was brought in equity he would do all he could to hasten a decision and not put any obstructions in the way, but he said he would oppose the construction of the lease placed upon it by the Association. (R. 255.) Of this complacency he and Mr. Cramer apparently repented afterwards when they realized that the most efficacious means of forcing plaintiff to abandon its leases or pay a largely increased rent was to leave it in full possession of all of its troubles, thus driving home to the minds of its officers and stockholders the conviction that there was no refuge from their demands in any court of justice.

It has been insistently argued that the record does not disclose any explicit threats or adverse assertions by these lessors. We do not believe it is necessary to labor that point before this court, which is presumably not ignorant of what everybody else knows. Negotiations in the modern business world are not couched in terms of express defiance like a challenge to a duel. The iron hand is no less potent because concealed in the velvet glove. We are not dealing with a civilization in which a successful litigant expects to be shot by his defeated adversary. The interviews show beyond a shadow of doubt that the lessors declined to permit plaintiff to go forward with any rebuilding plans and made it perfectly clear that any attempt to carry them into effect would be resisted, and it was only in the hope of evading the effect of this ultimatum that plaintiff opened tentative negotiations about the purchase of the fee. Under those circumstances it would be manifestly impossible for it to begin even the preliminary financing of its enterprise.

If any doubt had existed about this feature at the

time the motion to dismiss the bill was argued, such doubt would be dispelled by the answers filed and the defense made in this case.

> "Where the defendant in his answer sets up a claim to the property it is not necessary for the plaintiff to prove the assertion of the claim."
>
> 12 Encyc. of Evidence 608.

In *Brown* v. *Cox*, 158 Ind. 364, 68 N. E. 568, defendant appealed from a decree quieting plaintiff's title, and assigned as error that she was not shown by any direct evidence to be making any adverse claim. In her answer, however, she had asserted ownership of the property. The court, in affirming the decree, says:

> "It would seem that the trial judge might have found ample proof of appellant's adverse claim when she stood before the court denying appellee's ownership and right of possession and claiming both for herself."

In *Vaca Valley Co.* v. *Mansfield*, 84 Cal. 560, 24 Pac. 145, the defendants in a suit to quiet title moved for a nonsuit on the ground that plaintiff had merely proved his own title and had offered no evidence of adverse interest or claim on the part of defendants. The court says:

> "The obvious answer to this argument is that the complaint alleged, and the answers admitted, that the defendants claimed and asserted an interest in the property. It was not necessary, therefore, for the plaintiff, in opening its case, to offer any proof upon this subject."

In *Blair* v. *Chicago*, 201 U. S. 400, receivers of the street railway corporations, claiming that the franchises of the companies ran until 1960, filed bills for the purpose among others of quieting their title as against the adverse claim of the city that the franchises expired in 1903. As to the contention that the bill could not be

maintained as one to remove cloud on title, the court said (p. 449):

> "We think a case was made out by the allegations of the bills, especially when considered with reference to the admissions of the answer, which showed that the extent and character of the property rights of the corporations whose rights and franchises were the subjects of the receivership were in direct and serious controversy."

In *Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441, in which the decree removed as a cloud the claim of an easement not manifested otherwise than by verbal assertion, the court said:

> "If the defendants do not make the claim we have described, there was no necessity or propriety in the vigorous defense and elaborate preparation shown by the large record in the case."

The answer of Mark Skinner Willing and the other adult defendants associated with him as owners of the Walker fee contains the following (R. 169):

> "These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants, and conditions of the leases, if they be valid as leases, even though such removal may be incidental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while the old improvement is being wrecked, and before the new improvement is completed."

The Sears-Slater trustees, representing the owners of the Peck fee, say in their answer (R. 182):

> "These defendants aver that, if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste, and will give the owners of the land described in said Peck lease, according

to the terms thereof, the right to re-enter and repossess themselves of such land, free of any and all claims or rights of plaintiff."

Other allegations of similar tenor are found in both answers, and Louis M. Greeley and Roswell B. Mason, the guardians *ad litem* for the infant defendants interested in each of these fees, are shown by the record to have participated in the trial and to have joined in actively resisting the efforts of the plaintiff to secure relief.

ILLUSTRATIONS OF REMOVAL OF CLOUDS ON TITLE.

The jurisdiction of equity to remove clouds is as broad as the need. It will not be exercised to gratify anybody's curiosity, nor to anticipate fanciful exigencies that may never occur and can be met as well when they do, nor to accommodate the mere convenience of one whose rights can be adequately maintained in a court of law. In most or all of the following cases the jurisdiction could easily have been negatived by the quotation of familiar mechanical rules if the court had been unwilling to exercise its remedial powers.

Spurious stock will be canceled by decree of a court of equity when its existence in the hands of alleged owners clouds the title and impairs the value of genuine stock.

N. Y. & N. H. Ry. Co. v. *Schuyler*, 17 N. Y. 592.
Stebbins v. *Perry County*, 167 Ill. 567.

A suggestive case, in which Mr. Justice Sanborn wrote the opinion, is *Levy* v. *S. H. Kress & Co.*, 285 Fed. 836. A lessor brought an action at law to recover possession on the ground that the lessee, after pulling down a building, had not rebuilt the east wall as required by the lease, but had put up a row of columns

instead. The lessee's answer interposed various defenses, and prayed for a decree quieting defendant's title to the leasehold estate. It was held that the covenants of the lease were in fact broken, but since defendant in its answer offered to do equity a decree was directed permitting it to pay $3,500 as damages in lieu of strict performance of its covenants and *quieting its title* upon its complying with the terms of the decree. In justification of this decree, the terms of which are prescribed in the opinion at length, the court says:

> "All the facts conditioning the rights and equities of the parties to this suit under the lease and under the bond have been proved in this case, and the court below has plenary jurisdiction to consider, determine, and enforce all the rights and equities they claim in this suit against each other, and to make an end of these controversies."

An authoritative decision of this court on the subject of equitable jurisdiction is *Blair* v. *Chicago*, 201 U. S. 400, already cited, in which the chief bone of contention was the date of the expiration of the street railway franchises in the City of Chicago. Receivers alleged, as a basis of equitable jurisdiction, that they had been directed by the court to expend $580,000 for new equipment but were unable to borrow money on receivers' certificates because of the hostile acts of the city, which, in order to force the companies to surrender their franchises, pretended that the Act of 1865 was inoperative to confer upon the companies the rights claimed by them; and that the city, unless enjoined, would proceed to prevent the future occupation of the streets and would destroy the systems. Counsel for the city argued (p. 418) against the sufficiency of the bill as one to remove cloud or quiet title, citing *Holland* v. *Challen*, 110 U. S. 15, *Parker* v. *Shannon*, 121 Ill. 452, and other cases. The attorneys for the companies de-

fended the court's power to quiet the title as within the inherent jurisdiction of equity (p. 435). This court said:

> "While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested the asserted rights of the corporations to the franchise to use the streets of the city for ninety-nine years. * * * Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property."

It is hard to think of any one of the stock objections to the jurisdiction of equity to quiet title or remove cloud which might not have been alleged against the power of the federal court to remove as clouds upon the title to the companies' franchises the adverse claims of the city respecting their construction. The cloud was not found in any instrument, recorded or unrecorded, of which the invalidity could only be shown by extrinsic evidence; there was no fear of any interference with the possession so long as the receivership remained in force; the alleged cloud consisted of a claim that the franchises were to be construed otherwise than as the companies claimed; and for all intents and purposes, the only assertion of the adverse claim was verbal. The court, had it so willed, could have found a score of reasons for refusing relief, but having the will to act, it had no difficulty in finding a way. It chose to style the proceeding, in certain of its aspects, a bill to remove cloud and quiet title, but no reader of the opinion can doubt that jurisdiction would have been entertained to relieve an intolerable situation regardless of the name affixed to the bill, or even of its susceptibility of bearing any label. The fact that plaintiffs were receivers appointed by a federal court was material on the ques-

tion of federal jurisdiction, but had no bearing on that of the jurisdiction of a court of equity.

Judge Wilkerson brushed aside *Sharon* v. *Tucker* as being virtually a bill to perpetuate testimony. (R. 557-8.) The decision of this court was that a person who has acquired title by adverse possession may maintain a bill in equity to quiet his title against those who, but for such acquisition, would be the owners. After referring to cases of lost instruments the opinion proceeds as follows:

> "Many other authorities to the same purport might be cited. They are only illustrative of the remedies afforded by courts of equity *to remove difficulties in the way of owners of property using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed.* The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassments to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court." (Our italics.)

Were it necessary to bring the case now before this court within the narrower doctrine upon which *Sharon* v. *Tucker* is thought by the District Judge to rest, we may refer to the present record, which includes voluminous testimony of many witnesses in regard to conditions and occurrences of some forty years ago, without which it would have been difficult or impossible to establish the facts alleged in the bill and deemed essential to the proof of the averments of the plaintiff's bill of complaint. Illustrations may be found in the testimony of Edward H. Taylor (R. 210-213); Morris L. Greeley (R. 213-225); Edwin C. Searles (R. 226); R. Floyd Clinch (R. 227); John Dorr Bradley (R. 284-290); Bernard H. Lichter (R. 290-294); and defendants' witnesses Edward A. Renwick (R. 388, 390), and Paul F. P. Mueller (R. 440-468).

The decision of the Supreme Court of the District of Columbia in *Sharon* v. *Tucker* does not appear to have been reported, but the views of that court were no doubt those expressed by it in the previous year in *Contee* v. *Lyons,* 19 D. C. 207, in which the power of equity to quiet a limitation title was denied. The following reasons, given by the lower court for its decision, have a familiar ring to anyone who has followed the arguments in the present case:

> "The very term 'to quiet a title,' imports that there is something disturbing in it. In point of fact, it appears in this case that the heirs of Contee never agitated their title at all or made any claim whatever, the title simply lying dormant, not being asserted by anybody. As I said, the general implication from the term 'to quiet a title,' is that there is something disturbing it."

This court entertains very different views about the power of equity to quiet titles acquired by limitation. Those views have been followed and asserted with equal emphasis by the Supreme Court of Illinois.

Walker v. *Converse,* 148 Ill. 622.
Atchison Ry. Co. v. *Stamp,* 290 Ill. 428.

Another decision already sufficiently commented upon is *Fulwiler* v. *McClun,* 285 Ill. 174, where the obstacle to the enjoyment of property which the court removed as a cloud on title was a doubt as to the true construction of the instrument under which the plaintiff's title was derived, and where the record did not disclose any adverse assertion of that obstacle.

A building restriction which had become obsolete was removed as a cloud on title in *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372, 109 N. E. 162, and, as the Circuit Court of Appeals points out (R. 607), the attempt of defendants to show that the decision has been repudiated by the court which made it was unsuccessful.

Beyond question, the case most nearly in point on the issue of equity jurisdiction is *Rector, etc.* v. *Rector, etc.*, 201 N. Y. 1, 94 N. E. 191, which arose out of a bitter quarrel between two churches in the City of New York. Nothing could more vividly illustrate the broad and narrow views of equity jurisdiction than the opinions delivered at various stages of this celebrated case. The final decision sustained a decree removing as a cloud on the plaintiff's title a covenant in the deed through which it acquired that title restricting the use of the premises to church purposes. The decree of the lower court was affirmed by a vote of four justices of the Court of Appeals, three justices dissenting, and two opinions were filed, each of which was concurred in by three justices, while the chief justice merely concurred in the result "without indicating," as Judge Wilkerson says, "whether he regarded the general equity powers of the court or the state statute as the proper basis for the action." (R. 557.) It may be noted that neither in the Court of Appeals nor in the elaborate opinions in the court below was there any suggestion of reliance upon the statute. Extracts from the dissenting opinion, in which Judge Wilkerson concurs, are quoted at length in his opinion in the District Court. (R. 556-7.)

St. Stephens Church, the plaintiff, acquired title from the Church of the Transfiguration, defendant, to an uptown lot improved with a chapel. The deed contained a covenant that the property should not be used or occupied except for church purposes. The neighborhood became more populous, the congregation grew, the property increased in value, and plaintiff desired to borrow money on a mortgage for the purpose of enlarging the chapel. Being unable to do so on account of the restrictive covenant, plaintiff filed a bill to remove it as a cloud on the title and obtained a decree, which is

affirmed. The representative quality of the divergent views expressed in this New York church case must be our excuse for a further quotation from the majority opinion in the court below, where the doctrine which finally prevailed, and which Judge Wilkerson regards as unsound, received even greater elaboration than in the Court of Appeals.

> "It is objected that the plaintiff is not entitled to equitable relief of the nature sought in this action, but that, even assuming that the covenant is unenforceable, plaintiff must wait until some attempt to enforce it is made by defendant. The jurisdiction of equity to entertain an action to remove or cancel a cloud on title, notwithstanding there may be a complete defense to any attempt to enforce it, is of long standing and is well established. Ordinarily it is invoked when the cloud consists of some instrument dehors the plaintiff's chain of title, like an infant's deed or a fraudulent mortgage, or an illegal tax assessment. No reason is perceived, however, why the same jurisdiction may not be invoked, in a proper case, to cancel a cloud imposed upon the free use and enjoyment of the property, which, although contained in one of the deeds constituting the chain of title, is of such a nature that its elision from the deed will in no wise affect the devolution of title through the instrument. It is true that no case has been found where this particular relief, under similar circumstances, has been awarded, but it is equally true that no similar case has been found wherein such relief has been refused, and it is the boast and strength of equity jurisdiction that its rules and forms are so elastic that its decrees may be moulded to apply to any case to which the settled principles of equity ought to be applied."
>
> *Rector, etc.* v. *Rector, etc.*, 130 App. Div. 166, 114 N. Y. Supp. 623.

The actual decision recognizes the realities of the situation in which plaintiff was placed, owning a piece

of valuable property of which it was unable to enjoy the beneficial use by reason of an adverse claim under the terms of the deed through which the title was acquired. The adverse claim was a cloud that would in fact be removed by the proper decree of a court of equity if that court was willing to act, and could be dispelled in no other way. The dissenting opinion marshals all the stock objections to separate features of the case: it did not fall under any recognized head of equity jurisdiction; it was not a case of equitable cognizance; when a person brings an equitable action he must maintain it upon some equitable ground; no precedent was cited; if the covenant was invalid, any action at law to enforce it could be defeated; a cloud cannot be found in a provision of the instrument through which the plaintiff's title comes; there being no adverse claim to the property, the covenant could not create a cloud upon the title. This catalogue illustrates the familiar strategy of isolating the component parts of an organized unit and defeating each in detail. With respect to this decision the Court Court of Appeals, in its opinion in the present case, says (R. 607):

> "The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accorded to opinions of the majority of divided courts."

Absence of Remedy at Law as Basis of Equity Jurisdiction.

Given a primary right to the beneficial use of property, and an obstacle to the present enjoyment of the same which would in fact be removed by an appropriate decree, the lack of adequate remedy at law is the

sole and sufficient criterion of equitable jurisdiction. If those conditions exist, relief will never be refused for want of a precedent or procedural formula.

"Equity has followed the true principle of contriving its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

1 Pomeroy, Equity Jurisprudence, Sec. 111.

"It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

Toledo Ry. Co. v. *Pennsylvania Co.*, 54 Fed. 746.

"All who are conversant with the history of equity jurisprudence know that as a distinct system it has been of constant growth and development from its inception to the present time, covering a period of hundreds of years. The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the

> great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages and all people."
>
> *Dodge* v. *Cole*, 97 Ill. 338.

Our sole excuse for quoting to this court such ancient truisms lies in the insistent endeavors of adversary counsel to demonstrate the incapacity of equity to administer relief except within the straightjacket of pre-established and inflexible forms.

What Is an Adequate Legal Remedy?

If the owner of valuable property is being deprived of the beneficial enjoyment thereof, patient waiting until somebody else chooses to start a lawsuit is not an adequate remedy at law. The only other remedy ever suggested as available to plaintiff is to begin wrecking the building or do some other act which might precipitate a lawsuit. It was at one time seriously argued in this case that the defense of an adverse proceeding thus invited was an adequate remedy at law. Even if it wished to do so, however, plaintiff could not begin wrecking the building without a completed financial program, and the first steps in any financial arrangement cannot be taken until the doubts respecting the right to rebuild have been dispelled. But in any event, modern jurisprudence does not require parties to hazard their entire fortunes upon the correctness of their lawyers' opinions.

There was a time when the law was otherwise. A litigant was required to find the right remedy in the first instance, or else lose his case. In *National Bank* v. *Carpenter*, 101 U. S. 567, the court said:

> "Formerly, upon the allowance of a demurrer to a whole bill, the bill was out of court, and no sub-

sequent proceeding could be taken in the cause. * * * The rigor of this principle was subsequently relaxed."

Under the influence of similar conceptions, judges at one time were unable to regard the forbearance of a doubtful claim as sufficient consideration for a promise. The claim was either good in law or it was bad. If it was finally found to be invalid, the judicial mind was unable to see how its forbearance could have had any value.

Tooley v. *Windham,* Cro. Eliz. 206.
King v. *Hobbs,* Yelv. 26.
13 C. J. 346.

Ever since the decision in *Callisher* v. *Bischoffsheim,* L. R. 5 Q. B. 449, however, it has been established, in spite of an occasional outcropping of the ancient doctrine in a few backward American courts, that forbearance to sue upon a claim not legally enforceable but nevertheless asserted in good faith is sufficient consideration for a promise. In spite of this the mediaeval attitude of mind seems still to persist. We have been repeatedly told that the plaintiff must be either right or wrong; let it choose for itself and bear the responsibility and the consequences of its choice; if it begins to pull down the building, it has a perfect legal defense in case its legal advisers are in the right; if not, let it take its medicine. This course of procedure is what the court was asked to contemplate as an adequate remedy at law; it illustrates a point of view which might once have attracted legally trained minds but is abhorrent to modern ideas of justice.

The same plea has been interposed repeatedly against the efforts of persons or corporations to secure relief from oppressive and arbitrary statutes of undetermined

validity, such for example, as a statute of a state legislature prescribing maximum freight or passenger rates and imposing heavy penalties for disobedience to its provisions. The railroad company can test the law by violating its commands, and defending against a prosecution. The legal remedy in that case exists without doubt, but is it adequate? Modern courts have uniformly decided that it is not. The company in such a case, where the penalty in the event of an adverse decision would be so heavy as to deter it from resorting to a court of law, is entitled to appeal to equity and enjoin the enforcement of the act until its validity is determined, and even if the act is finally adjudged to be valid, no penalties can be enforced for violation of its provisions *pendente lite.*

Ex parte Young, 209 U. S. 123.

Wadley Southern Ry. Co. v. *Georgia,* 235 U. S. 651.

Oklahoma Operating Co. v. *Love,* 252 U. S. 331.

Decisions under the Alien Land Acts of the Pacific States enunciate a similar principle. A typical case was one brought by landowners and a Japanese farmer to whom they wished to make a lease. This they were deterred from doing for fear lest the Attorney General would proceed under the statute to prosecute them and escheat the property. This court in sustaining the bill said:

> "Assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the

law deters them. * * * They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights."

Terrace v. *Thompson*, 263 U. S. 197.

Other recent cases in this series, or involving like principles, are

Porterfield v. *Webb*, 263 U. S. 225.
Webb v. *O'Brien*, 263 U. S. 313.
Fick v. *Webb*, 263 U. S. 326.
Pierce v. *Society of Sisters*, 268 U. S. 510.

WAITING TO BE SUED NOT AN ADEQUATE REMEDY.

In *Sherman* v. *Fitch*, 98 Mass. 59, the owners of personal property filed a bill to remove a cloud on the title created by a mortgage which was alleged by the complainants to be void. A demurrer on the ground that complainants had an adequate remedy at law was overruled, the court saying:

"We cannot see that the complainants, upon this state of facts, have any remedy at law. They have no cause of action against the defendant. They are in possession of the property and he has not disturbed their possession. He might bring an action against them, but he does not choose to do it. In the meantime there is a cloud upon their title which seriously affects its value."

In *Voss* v. *Murray*, 50 Ohio St. 19, 32 N. E. 1112, the court said, with respect to the removal of a cloud upon a stock of jewelry:

"That one who has, as an attaching creditor, acquired a lien upon personal property, may maintain a suit for the purpose of ascertaining the extent or existence of adverse claims to the same property or removing clouds upon it that would affect its sale in the proceeding, is supported by principle as well as authority. The property being in the custody

> of the sheriff under the attachment, the creditor has no possessory action against other claimants or lienholders by which the validity of their claims can be determined, and as they may not choose to institute such an action he is without any remedy at law other than to sell the property subject to clouds upon it, which is not an adequate remedy."

The basis of the jurisdiction of a court of equity in all such cases is the lack of an adequate remedy at law, and it is no answer to the appeal for equitable relief that the complainant has a complete legal defense against the adverse claim of which he complains. The lack of remedy at law consists in the very fact that the adverse claimant cannot or will not bring suit. It is not the *assertion* in court of the adverse claim, but the very fact of its *nonassertion* which creates the removable cloud. Courts of equity have frequently dwelt upon the inaction of an adverse claimant as a persuasive argument in support of their own jurisdiction.

> "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity."
>
> *Holland* v. *Challen*, 110 U. S. 15.

The following is from an opinion by the present Chief Justice in a case heard before him and Justices Harlan and Lurton:

> "It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint actual or threatened, and the collecting officer by not distraining may wholly deprive the taxpayer of this remedy. * * * It would seem clear that a court

of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. *The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.*" (Our italics.)

Bank of Kentucky v. *Stone*, 88 Fed. 383.

"In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners."

Fredenberg v. *Whitney*, 240 Fed. 819.

"Must plaintiff sit idly by with folded hands and wait several years until the defendant city shall undertake to levy executions upon his property with the purpose of selling it at judicial sale, and then, and not till then, by motion to quash the executions, or by other remedy at law, raise the question of the validity of the benefit assessment liens? Surely, no. The liens are apparent upon the public records and until their validity and effect is judicially determined, they necessarily hinder the plaintiff in the free and unrestricted use and disposition of his property, thereby casting a cloud upon his title. He is entitled not only to a future but to a present remedy, which is afforded only by a suit in equity to remove the cloud."

Schwab v. *St. Louis*, 310 Mo. 116, 274 S. W. 1058.

"No doubt, if the plaintiff were to proceed to build upon the strip of land in dispute, it is possible that a suit at law would be instituted against him in which his rights would eventually be passed upon. But it is equally possible that no such suit would be

> brought, at least for a period of years. In the meanwhile, the title, not merely the possession, would remain doubtful and unmarketable. But the owner of property has a right not only to use it but to sell it; and in that right, incapable of being enforced in any legal action he can institute, he is entitled to be protected."
>
> *Slegel* v. *Harbine*, 148 Pa. St. 236, 23 Atl. 996.

In the case now before the court, all the lessors need do is to stand idle while the plight of the lessee descends from bad to worse, and unless equity gives relief, the plaintiff will be forever debarred from exercising its right, the existence of which is conceded at this stage of the argument, to replace the present obsolete building by one adapted to the premises.

Declaratory Judgments.

Great stress was laid during the argument of this case in the courts below upon decisions respecting "declaratory judgments," of which *Muskrat* v. *United States*, 219 U. S. 346, and *Anway* v. *Grand Rapids Railway Company*, 211 Mich. 592, 179 N. W. 350, were cited as conspicuous examples; rather, it may be supposed, on account of certain language in the opinions than because of any application of the cases themselves to the one at bar. The doctrine, which is stated in many forms, is in substance that equity will decline jurisdiction to declare legal rights not involved in any existing controversy for mere purposes of future reference. No useful purpose would be subserved by examining in detail at the present time the numerous cases in the state courts in which this view has been enunciated. The principle itself, abstractly considered, is clearly sound. Courts are not organized to try moot cases. As with every abstract statement of legal doctrine, the virtue of this principle

depends upon its application. A plaintiff's embarrassments may be remote or contingent or speculative in varying degrees, or they may be actual and imminent. Courts will differ in their estimates of the urgency of any given situation. We do not pretend to reconcile all the decisions with our own views of equitable competency. In a given case, however, it is not important to determine where a dividing line is to be drawn, so long as it is perfectly clear that the case lies on a certain side of the line wherever drawn. Such is the one now before the court, and we do not think anybody will seriously argue that it is lacking in the requisite of immediacy.

It is doubtless true that courts ordinarily refuse to enter judgments declaring rights with respect to which no present cause of controversy exists, but this doctrine does not affect the jurisdiction of equity to remove clouds from title. That jurisdiction ordinarily rests on the existence of actual or imminent claims which do in fact impair the value of property. To say that a decree annulling such a claim is merely a declaratory judgment, in the obnoxious sense of that term, is merely to say that the particular claim under consideration is not a cloud on title. Any other conclusion would be a mere denial of the existence of this branch of equitable jurisdiction.

The complicated problems incident to modern social, commercial, and industrial development often make it very important that the rights of parties be settled before they are directly involved in litigation. Generally the courts have not shirked the task when the necessity of an adjudication was sufficiently urgent, but they have been and are naturally reluctant to take jurisdiction of questions of a remote or speculative character, and they have not always been at one about the degree of vex-

atiousness that will warrant such intervention. The expediency of giving the courts jurisdiction to pronounce declaratory judgments in all cases without distinction may be debatable, but the movement in that direction indicates a widespread feeling that a freer exercise of this jurisdiction is needed to meet the exigencies of the business world.

Various decisions of this court now for the first time cited, such as *United States* v. *Hamburg-America Co.*, 239 U. S. 466, and *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, merely announce the salutary and uncontroverted doctrine that courts will not hear a case after it has been settled or has otherwise become moot. Whatever divergencies may be found among the decisions in the state courts, we believe no federal decisions give any countenance to the alleged incompetence of a court of equity to relieve an owner of valuable property rights from a plight so immediate and so injurious as that disclosed by the present record.

II.

FEDERAL JURISDICTION.

The active defendants in this cause occupy two camps, having identical interests but employing opposite tactics. The Peck fee belong to the Sears-Slater trustees, who removed the cause to the federal court; the Walker fee to the Willing trustees, who sought to remand it to the Circuit Court of Cook County where it originated. One group of defendants contends that the plaintiff's causes of action cannot be prosecuted together; the other that they cannot be prosecuted separately. Thus one or other of them is in a position to allege error whichever argument might prevail. The Sears-Slater trustees not only claimed to have a separable controversy with the plaintiff, but contended that the bill was multifarious (R. 212) as improperly joining two or more distinct and unrelated causes of action. The Willing trustees originally made the same claim (R. 137), but after denial of their motion to dismiss the bill (R. 140) they faced about and moved in the District Court for a remanding order (R. 194) on the ground that the cause of action set forth in the bill is single and indivisible, and not even susceptible of being resolved into separate controversies. After dismissal of the bill by the District Court, they did not renew the motion in the Circuit Court of Appeals until that court had reversed judgment and entered its order remanding the cause to the District Court. (R. 609.) This order was dated June 7, 1927, and it was on the 25th of that month that motion was filed in the Circuit Court of Appeals to vacate all orders and remand the entire cause to the Illinois state court. (R. 631.) Their contention in that motion was again that the controversy was "single and entire." They never found

this case so inseparable from that of the other defendants as to lead them to object to the jurisdiction of the federal courts except at such times as the battle seemed to be going against them.

The main difference between the Act of 1866, which first gave the right to remove a separable controversy, and the present Act of 1875, is that the removal under the latter act of a separable controversy carries the whole cause into the federal court. Except for that difference, the language of this court in the leading case of *Barney* v. *Latham*, 103 U. S. 205, with respect to the Act of 1866 is entirely applicable to the one now in force:

> "It proceeds, plainly, upon the ground among others that a suit may under correct pleading embrace several controversies, one of which may be between the plaintiff and the defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although the citizen of another state under the particular mode of pleading adopted by the plaintiff is made a co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separable controversy, be required to remain in the state court and surrender his constitutional right to invoke the jurisdiction of the federal court."

The reasons which led Congress to amend the procedure by providing that all defendants who are properly joined as such must follow the case into the federal court are thus set forth in *Barney* v. *Latham:*

> "Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the federal court and leaving others in the state court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their

> circumstances as to make all who sue, or are sued, proper though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions Congress determined that the removal of the separable controversy to which the judicial power of the United States was by the Constitution expressly extended, should operate to transfer the whole suit to the federal court."

The present case was properly removed to the District Court unless a separate suit in the federal court against the Sears-Slater defendants to obtain, with respect to their properties alone, the relief sought by the bill of complaint would have been necessarily dismissed for non-joinder of the Willing defendants, who are citizens of the same state as plaintiff and whose joinder as defendants would therefore oust the jurisdiction of the court. The question whether the controversy in this cause with the Sears-Slater interests is separable within the meaning of the Removal Act, and the question whether the Willing defendants would be indispensable parties to a suit brought for the relief sought in this bill against the Sears-Slater defendants alone, are one and the same.

> "The case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."
>
> *Fraser* v. *Jennison,* 106 U. S. 191.

Such is the test of federal jurisdiction in removal cases established as the settled law of this court ever since the decision in *Barney* v. *Latham,* 103 U. S. 205, in which the plaintiff sued a corporation of his own state and individual citizens of other states, and in sustaining

the right of the latter to remove the cause on the basis of their separable controversy this court said:

> "With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company."

This criterion is conceded to be the true one, and it devolves therefore on parties disputing the jurisdiction of the District Court in this cause to demonstrate that the relief sought by plaintiff against the Sears-Slater defendants could not have been granted in a separate suit against them alone. This means, *first,* that if the separate suit had been brought against them in a state court, they could have defended it successfully on the ground that the Willings were *necessary* parties, and *secondly,* that if the separate suit were in the federal court it could not be entertained at all because the Willings were *indispensable* parties and could not be sued in that forum. The two questions are by no means the same. We think, however, that counsel for petitioners misconcieve the nature and object of the bill of complaint. In their petition for a writ of certiorari (p. 11), and again in their brief (p. 36), it is argued that any relief under the prayer of the bill of complaint "must be spread over the whole property as against all the fee owners, all the bondholders, the mortgage trustee, and all others interested," whence the conclusion is drawn that "there was only one controversy, which affected

alike all the defendants." The assertion that "relief must be spread over the whole property" appears to us to be a vague generality devoid of definite meaning and having no basis in the pleadings. The plaintiff does not ask a decree requiring the Sears-Slater defendants or anybody else to remove the building which stands on their property. In the separable controversy to which they are parties, the decree sought by plaintiff would not operate upon the building but only upon them individually. If plaintiff began to wreck the building after entry of a decree against them, every other party would have identically the same rights and remedies as if no such decree had been made. It would not give or purport to give, except as against the Sears-Slater defendants alone, any right to disturb the present structure, and the Willing defendants could not be prejudiced thereby, even if it were true, as they seem to suppose, that they have an easement for the perpetual maintenance of a worthless and burdensome building which has entirely survived its useful life. This supposititious easement could suffer no diminution by any decree binding alone on the Sears-Slater defendants.

The specific relief sought by the present bill of complaint (R. 31) with respect to the Sears-Slater (Peck) interests is a decree (1) removing from the Peck leasehold the obstacles which prevent the present enjoyment and use thereof by its owners, consisting of the cloud cast thereon by the claims and doubts about the plaintiff's right under its lease; (2) quieting and establishing the plaintiff's title to the Sears-Slater (Peck) leasehold as a title which includes the "full right" of the owner thereof, as against the Sears-Slater defendants, to remove any buildings from the same upon giving such security as the court may direct, all as incidental to the erection thereon of a more valuable building; and (3)

as an incident and corollary of the primary relief, enjoining the Sears-Slater defendants from attempting to assert a forfeiture of the lease of their land by reason of such acts of the plaintiff, and from taking any steps to prevent removal by plaintiff of the building now located on the Sears-Slater (Peck) property. If all of this relief were granted against the Sears-Slater defendants, what right of the Willing defendants would be lost, impaired, qualified or altered in any way? Such a decree against the Sears-Slater defendants could not derogate from any right which the Willing defendants may have to resist, in court or out, any attempt of the plaintiff to remove the Auditorium Building.

Separable Controversies and Indispensable Parties.

A necessary party under the ordinary rules of equity is often not an indispensable party as that term is used in defining federal jurisdiction. It was the practice of the High Court of Chancery to require all persons to be brought before it whose presence would promote a complete settlement and disposition of all controversies with respect to the subject matter of the litigation, but in a great many cases the court dispensed with this requirement as to parties outside of the realm and proceeded to a decree as between those whom it could reach. The same principle has always been applied by the federal courts of this country with respect to persons who might be deemed necessary parties but whose citizenship would prevent them from being joined as such without ousting the jurisdiction of the court. These principles were fully established long before Congress authorized the removal of separable controversies, and they are the decisive factor in determining whether a controversy is in fact separable within the meaning of the Removal Acts.

Chief Justice Marshall pointed out in *Russell* v. *Clarke's Executors,* 7 Cranch. 69, that the question for a federal court to determine before declining jurisdiction is, whether a decree can be entered by the court, as between the parties before it, "without essentially affecting the interest of absent persons"; and in *Elmendorf* v. *Taylor,* 10 Wheat. 152, the same learned chief justice said:

> "In the exercise of its discretion the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as, if such party be a resident of some other state, ought not to prevent a decree upon its merits."

In the leading case of *Shields* v. *Barrow,* 17 How. 130 these principles are more definitely elaborated by Mr. Justice Curtis, who, in language frequently reiterated in later decisions, refers to and develops Chief Justice Marshall's classification of parties as follows:

> "1. Formal parties.
>
> 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties.
>
> 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

A convenient and comprehensive summary of the federal law respecting parties in equity has been given by Judge Sanborn in substantially identical language in a number of cases, of which the following is from *Sioux City Terminal Co.* v. *Trust Co. of North America*, 82 Fed. 124:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party under the old chancery rule unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the court as to the parties before it, the suit may proceed without him, and the decree will not affect his interests."

The parties whose citizenship is alleged to withdraw the present case from the jurisdiction of the federal court are the owners of the Walker fee, otherwise known as the Willing defendants, and the trustee under the two mortgages upon plaintiff's leasehold estates. The Chapin trustees, though taking no active part in this contest, stand in the same relation to the removable controversy as the Willing trustees, but are generally omitted from this discussion for purposes of simplicity. We re-

spectfully submit that several causes of action are combined in this suit in accordance with approved equity practice; that it lies in the choice of the plaintiff whether to unite them or to bring separate suits; that such joinder does not make the bill multifarious, and if it did the objection would not go to the jurisdiction of the federal court; that on the other hand, these causes of action are not joint and the effect of their joinder is not to make them so; and that the mortgage trustee is in no sense an indispensable party to the relief sought against the Sears-Slater defendants.

The contention of petitioners is and must be that the bill, if filed against the Sears-Slater interests alone, would necessarily have been dismissed because the Willings were not parties and could not be made such without defeating the jurisdiction of the court. They did not conceive their interests as so inextricably blended with those of the Sears-Slater defendants when they moved the District Court to dismiss the bill of complaint—

> "because the said amended bill is multifarious in that it joins as codefendants with these defendants persons not interested in or with respect to the so-called Walker leases (in which alone and in the premises thereby demised these defendants are interested) but in other and different leases by other lessors demising other and different premises to the complainant herein." (R. 137-8.)

Now they say there is in the case only one controversy, which affects all the defendants alike; and this too in the face of their major contention that the bill is fatally defective because it asks only for an academic declaration of the rights of the parties. The District Judge condemned the bill because it does not ask for a decree that anybody do anything, and yet the petitioners now insist that the relief which it prays for against the Sears-Slater defendants would prejudice their own interests.

No doubt this court, in passing on questions of federal jurisdiction, may determine the nature of the suit for itself without necessarily adopting the views of parties or their counsel who raise the objection, but we do not believe that this court need wholly ignore the views persistently urged by the objectors at various stages of the litigation regarding their own position in the suit.

The most obvious example of a decree which would injure absent parties is one operating directly upon property in which they have an interest. The early case of *Russell* v. *Clarke's Executors*, 7 Cranch, 69, was essentially a case of that character. The decree sought by the bill would have swept away the fund itself. *Williams* v. *Bankhead*, 19 Wall. 563, illustrates the same principle. The bill related to the actual disposal of a fund in which a nonresident widow had an interest. In like manner, all members of a partnership are deemed to be indispensable parties to a decree affecting the disposition of a fund belonging to the firm.

Raphael v. *Trask*, 194 U. S. 272.

An entire bond issue cannot be canceled by a decree unless all holders of the bonds are before the court.

Brown v. *Trousdale*, 138 U. S. 389.

A bill to settle the ownership of stock and procure the issue of new certificates requires action by the corporation and cannot ordinarily be maintained in its absence.

Kendig v. *Brown*, 97 U. S. 423.
St. Louis Ry. Co. v. *Wilson*, 114 U. S. 60.
Crump v. *Thurber*, 115 U. S. 56.

Where a bill seeks, through an accounting or the recission of fraudulent transfers or otherwise, to create and define a fund in which various persons are interested,

the amount of the fund thus to be established is something that affects them all, and all are necessary parties; but when a definite or aliquot share in a fixed fund can be allotted to the plaintiff without prejudice to the rights of others, the latter may be dispensed with.

Hagan v. *Walker*, 14 How. 29.

Wood v. *Dummer*, 3 Mason 308; 30 Fed. Cas. No. 17944.

Greene v. *Sisson*, 2 Curt. 171; 10 Fed. Cas. No. 5768.

Tobin v. *Walkinshaw*, 1 Mc All. 26; 23 Fed. Cas. No. 14068.

Martin v. *Fort*, 83 Fed. 19.

Those cases illustrate the general principle that a decree which merely settles rights as between the parties to the suit, without operating upon the property in which those rights inhere, cannot be regarded as injuriously affecting other persons having rights in the same property who cannot be brought into court.

A proceeding to recover possession of personal property and procure delivery thereof differs from one in which the object is merely to determine the ownership of the property. In the former case a third person in possession of the property is an indispensable party because any decree must bind him in order to be effective; otherwise, when the object of the suit is merely to determine the ownership.

Wilson v. *Oswego Township*, 151 U. S. 56.

Construction Company v. *Cane Creek Township*, 155 U. S. 283.

Salem Trust Company v. *Manufacturers Finance Company*, 264 U. S. 182, 190.

The facts appearing in *Waterman* v. *Canal-Louisiana Bank Co.* 215 U. S. 33, were that a testatrix had died in New Orleans leaving four heirs, one of whom, a niece residing in Chicago, filed the bill in the Louisiana federal court against the executor and two of the other heirs, named Waterman, alleging that the fourth heir, one Davis, was a resident of Alabama and beyond the jurisdiction of the court. Plaintiff claimed to have become solely entitled to certain lapsed or void legacies on the ground that the other heirs had renounced their rights as such, and she asked for a decree establishing her rights as against the defendants, directing an account of the estate in the hands of the executor, and ordering the executor to pay over to her as sole heir the amount so found due. A decree dismissing the bill for want of jurisdiction is reversed, and it is held that the absentee heir, Davis, was not an indispensable party. A decree, while it could not invade the exclusive jurisdiction of the Probate Court to retain possession of the property and determine the amount of the estate, could fix the rights of the parties actually before the court without prejudice to those of Davis. On this point the court said:

> "If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne* v. *Hook*, 7 Wall. 425. * * * With the parties before it the court may proceed to determine whether, because of the acts alleged in the bill, the heirs at law of Mrs. Tilton were entitled to recover because of the lapsed legacy. If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the com-

> plainant and the Watermans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest."

The causes of action in the Auditorium case against the different groups of defendants are several and not joint, and arise under separate instruments. They were combined for convenience of litigation, and it rested in the discretion of the plaintiff whether to bring one suit or more. The liberty of choice was at least as great as that of the plaintiff corporation in *Bitterman* v. *Louisville Railroad Company*, 207 U. S. 205, when it filed a single bill to enjoin seven ticket brokers from selling nontransferable round-trip tickets issued at reduced rates, and this court, in affirming the decree, said:

> "The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and therefore might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions."

The bill was not multifarious, and if it had been, that fact would have no bearing on the question of federal jurisdiction:

> "No complaint is multifarious which presents a common point of litigation the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but

it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others."

Elder v. *Western Mining Co.* 237 Fed. 966, 977.

At common law, where two or more persons are liable the cause of action is either joint or it is several, or if it is joint and several it becomes one or the other at the election of the plaintiff. The joinder of causes of action in equity is a matter of convenience and discretion, and cannot in any event affect the jurisdiction.

Barney v. *Latham*, 103 U. S. 205.

Graves v. *Ashburn*, 215 U. S. 311.

Commodores Point Terminal Co. v. *Hudnall*, 283 Fed. 150, 171.

Schell v. *Leander Clark College*, 2 Fed. (2d) 17.

The argument has been advanced, resting on a false analogy with actions at law, that the joinder of separate causes of action in a single suit converted them into a single joint cause of action. That is a doctrine appertaining to legal causes of action which are technically joint and several. If two persons are jointly and severally liable at law, and the plaintiff brings a single action against both, his election to treat the liability as joint cannot be questioned by either defendant. In such a case, one of the defendants who is a citizen of a state other than that of the plaintiff has no separable controversy, and this is generally true even though the complaint shows that the joint liability alleged by the plaintiff does not in fact exist. The absence of joint liability is a substantive defense which does not enable a defendant to assert the existence of a separable controversy so long as the plaintiff continues to prosecute his suit

in the form which he has elected to adopt even though his own pleadings negative his right to adopt it.

Pirie v. *Tvedt*, 115 U. S. 41.

Louisville & Nashville R. R. Co. v. *Ide*, 114 U. S. 52.

Alabama Southern R. R. Co. v. *Thompson*, 200 U. S. 206.

Illinois Central R. R. Co. v. *Sheegog*, 215 U. S. 308.

Chicago, Rock Island & Pacific Ry. Co. v. *Dobell*, 229 U. S. 102.

Hay v. *May Department Stores*, 271 U. S. 318.

Such cases always involve a cause of action which is in fact joint at the election of the plaintiff, and the principle invoked has no application to equity, in which "a suit may under correct pleading embrace several controversies," and in which Congress has recognized that "it was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue or are sued proper though not indispensable parties."

Barney v. *Latham*, 103 U. S. 205.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.

In a suit to quiet title which had been removed from a state court, the District Judge denied a motion to remand, and after referring to the doctrine of *Pirie* v. *Tvedt*, 115 U. S. 41 and other similar cases, said:

> "The present case does not come within the principle of these decisions. The bill to quiet title was not filed to settle a single controversy. It was filed for the purpose of adjudicating any and all adverse titles held by the defendants and each of them."

Bacon v. *Felt*, 38 Fed. 870.

And in *Venner* v. *Southern Pacific Co.* 279 Fed. 832, commented upon below, it was pointed out that the doctrine of this court with respect to actions at law against two or more tortfeasors or contractors on a joint and several liability was inapplicable to proceedings in equity.

Wherever a separable controversy exists in equity it is because the plaintiff has chosen to combine in one suit two or more controversies which he might have pursued separately, and if his election to unite distinct causes of action in one proceeding operated to convert them into a single indivisible cause of action the provisions of the Removal Act would be meaningless.

If the different groups of defendants were sued on a joint liability, or if the object of the suit were to set aside or otherwise affect some instrument under which they all claimed as their common source title, it may be that under the authorities no one of those groups would have a separable controversy. Wanting those conditions, the controversies are separable. In the present case the different groups of defendants own separate tracts, but the criterion suggested would hold good even if they owned undivided interests in the same tract as tenants in common.

A purchaser of land brought suit in a state court against the heirs of his grantor to set aside as a cloud upon his title "some claim to the premises" which they were setting up, and it was held that one of the heirs with the requisite diversity of citizenship had a separable controversy which was separately removable under the Act of 1866. Reasons given by the court were as follows:

> "If the defendants have any interest at law or in equity in the premises, they must claim as the heirs of their ancestor or the donees of the United

States. In that case they must claim as tenants in common. If so, the interest of each in the land would be distinct from that of the other, and the suit might be separate as to each of them."

Field v. *Lownsdale*, 1 Deady 288; 9 Fed. Cas. 4769.

In justification of a removal of the entire cause under the Act of 1875 under similar circumstances the court said:

"The district judge, with the concurrence of the circuit judge who was consulted, denied the motion, upon the ground that if the defendant Warren had any interest in the premises, he was simply a tenant in common with the complainants, and that therefore the controversy, so far as he was concerned, could be determined without the presence of the other defendants as parties."

Goodenough v. *Warren*, 5 Sawy. 494; 10 Fed. Cas. 5534.

The same question was presented in its other aspect in a suit brought by a nonresident plaintiff in the federal court to quiet his title to an undivided five-eighths of a tract of land. The defendants pleaded in abatement that the owners of the other three-eighths, including Walker and Dickinson, who could in fact not be joined without depriving the court of jurisdiction, were necessary parties. Judge Deady overruled the plea and, after quoting from page 571 of the opinion of Mr. Justice Bradley in *Williams* v. *Bankhead*, 19 Wall. 563, said in part:

"Admitting that the defendants and Walker and Dickinson claim each an interest in this property adverse to the plaintiff as set forth in the plea, they must claim as tenants in common, and therefore the claim of each is separable and distinct from the other, although it may arise in the same way and be established by the same proof. The case falls within the third of Mr. Justice Bradley's categories.

> Walker and Dickinson have an interest in the subject matter, and their claim being of the same nature as the defendants and growing out of the same circumstances, they might be joined in this suit, at the option of the plaintiff, as a matter of convenience to him. * * * The fact that the determination of the controversy in this suit will not settle any controversy the plaintiff may have with Walker and Dickinson touching any claim they may make to the property is not a matter which concerns these defendants."
>
> *Goldsmith* v. *Gilliland*, 24 Fed. 154.

A claimant of land brought suit under the Iowa code to recover possession from the occupant, who was alleged to hold under a lease from the other defendants, and to recover damages for injury to the buildings and conversion of the crops, and to settle all adverse claims of title on the part of all defendants. The occupant was held to have a separable controversy which entitled him to remove the cause to the federal court. In an opinion denying a motion to remand the District Judge said:

> "The petition does not aver that all the defendants claim title to the realty jointly, or under one common source of title; nor does it aver that they jointly converted to their own use the crops growing on the land, or that they jointly injured the buildings for which the damages are prayed. * * * The decisions, therefore, defining the rule applicable to suits based upon joint or joint and several causes of action do not touch a case of the peculiar character now before the court."
>
> *Stanbrough* v. *Cook*, 38 Fed. 369.

Another decision in the same circuit arose out of a bill filed in the state court by part of the heirs of a deceased landowner to quiet their title and remove the cloud of a deed executed by the administrator of such former owner, and for an accounting of rents and prof-

its. Among the defendants was a railway company, which claimed a part of the premises and removed the cause to the federal court. On motion to remand the plaintiff cited the decisions with respect to actions at law sounding in tort or contract, wherein it was held that a defendant sued jointly with a codefendant could not create a separable controversy by pleading a separate defence. These precedents were held to be inapplicable, since "the bill to quiet title was not filed to settle a single controversy."

Bacon v. *Felt*, 38 Fed. 870.

Another suit to quiet title was brought in a California state court by a citizen of that state alleging that defendants claimed some interest in the property, the nature of which was to the plaintiff unknown. One of the defendants removed the case to the federal court on the ground that he had a separable controversy, and Judge Morrow denied a motion to remand, saying:

> "The plaintiff does not aver that all the defendants claim title to the realty jointly, or under one common source of title. * * * Where an action is brought by one plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject matter of the action, but merely for convenience, it will generally be capable of resolution into separable controversies between the plaintiff and the individual defendants."

Bates v. *Carpentier*, 98 Fed. 452.

In a similar suit against three groups of defendants to quiet title to mining property removed from a state court by one of the groups, the District Judge, in refusing to remand the cause, said in the course of his opinion:

> "There is no averment that the defendants claim under any common source of title or of right. The

> defendants are not jointly mentioned, except by groups, viz.: (1) Canton Mining Company, Mrs. McKinley, and Mrs. Barber, (2) McKinley Mining & Smelting Company, and (3) the Carothers family. There is no averment that the defendants mentioned in the first group are jointly interested in any way with the defendants mentioned in the third group. From these averments it is manifest that this case does not come within the principles announced in *Torrence* v. *Shedd*, *supra*, or of any of the authorities therein cited, which are relied upon by plaintiff herein as sustaining his motion."
>
> *Carothers* v. *McKinley Mining Company*, 116 Fed. 947.

A bill was filed in a federal court in North Carolina to remove a cloud on title and for the usual injunction and general relief. Among the defendants were two citizens of the District of Columbia, as to whom the Circuit Judge permitted the plaintiff to dismiss his bill, holding that they were not indispensable parties for the following reasons:

> "The proper test is whether, in this suit, a decree can be entered without affecting the interests of the defendants beyond the jurisdiction of the court. It cannot be seriously contended that a decree of this court declaring the complainant to be the owner of the lands in controversy and restraining the other defendants from asserting title to the same could in the slightest degree affect any claim which the defendants Grinnell and wife may have to an interest in the property."
>
> *North Carolina Mining Co.* v. *Westfeldt*, 151 Fed. 290.

In another suit which was removed from the state court by the Halleck Cattle Company, the character of the suit and the ground for denying a motion to remand are indicated by the following extract from the opinion of the District Judge:

> "The suit was brought to quiet plaintiff's title

to the use of the first 25 cubic feet per second of the waters flowing in Boulder creek, a natural surface stream of water, situated in Elko county, Nevada Beside the Halleck Cattle Company, there are nine defendants arranged in three groups. The complaint contains no allegation which in any manner indicates that Halleck Cattle Company's use or appropriation of the waters of the creek, or its claim of title thereto, is in any way connected with the use, claim or appropriation of any other defendant or defendants, except that each defendant is interested in the same stream, the waters of which are insufficient to answer the aggregate demands of all. * * *

The present case can be separated into parts so as to leave a separate and distinct cause of action between Samuel McMullen, a citizen of Nevada, and Halleck Cattle Company, a citizen of California. On this cause of action a separate and distinct suit could have been brought, and the full nature and extent of the company's claim to the use of said 25 cubic feet per second of the waters of Boulder creek could be determined as against complainant, without the presence of any other defendant as party to the controversy. The motion to remand must be denied."

McMullen v. *Halleck Cattle Co.* 193 Fed. 282.

This consensus of opinion in the lower federal courts is enough to show that the controversies in the present case would be deemed separable even if the Willing defendants had owned an undivided fractional interest in the Sears-Slater property, instead of the easements which they claim in their brief.

Many other cases, though not involving clouds on title, define separable controversies on the basis of principles applicable to the present case.

Barney v. *Latham,* 103 U. S. 205.

Geer v. *Mathiesen Alkali Works,* 190 U. S. 426.

Winfield v. *Wichita Natural Gas Co.* 267 Fed. 47.

Venner v. *Southern Pacific Co.* 279 Fed. 832 (Certiorari denied, 258 U. S. 628).

Old Dominion Oil Co. v. *Superior Oil Corporation,* 283 Fed. 636.

Davidson v. *Montana-Dakota Power Co.* 22 Fed. (2d) 688.

JOINDER OF THE MORTGAGE TRUSTEE.

We now come, with as much patience as the contention admits, to the last phase of the petitioners' argument against the jurisdiction of the federal court. The Illinois Trust and Savings Bank, now Illinois Merchants Trust Company, is in its relation to the separable controversy merely the trustee under mortgages of the plaintiff's leasehold estate in the Peck property. In view of the remoteness of any connection between the interest of the Willing defendants in their own fee on the one hand and that of the trustee in the property of the Sears-Slater defendants on the other, we can see in the arguments of petitioners on this point nothing better than the suggestions of *amici curiae*, to be given the same degree of attention as if a stranger had asked this court to interpose the objection on its own behalf.

Even if the plaintiff were the party insisting that the cause should have been remanded to the state court, the obvious answer would be that the Sears-Slater defendants themselves, as lessors of the Peck fee, are strangers to the mortgage made by the lessee on its leasehold estates therein. What arrangements or adjustments the plaintiff may finally make with its bondholders or the trustee is something which does not concern the Sears-Slater defendants, and which, if possible, concerns still less the Willing defendants. As if, however, this court had of

its own motion invited argument on that point, we proceed to offer a few comments on the relation of the mortgage trustee to the controversy between the plaintiff and the Sears-Slater defendants.

In their petition for a writ of certiorari (p. 11) and again in their present brief (p. 17) the petitioners say that the "mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois." The accurate portion of this statement is the one with respect to the citizenship of the trustee. The record does not show the trustee to have been "actively resisting" plaintiff's suit at the time of its removal from the state court. What the bill of complaint alleged was (R. 29) that the bondholders were favorably disposed to the erection of a suitable building, but were entitled to be heard about the security or other terms which might be prescribed by the court as a condition thereto, and that they were fully represented in the cause by the Bank as their trustee. The demurrer interposed by the Bank in the state court (R. 104) was on the ground that it was not empowered by the terms of the trust deed to represent the bondholders in a suit of this peculiar character and that the bondholders were accordingly themselves necessary parties. The demurrer gave nine reasons in that many separate paragraphs why the reconstruction of the building was a matter unrelated to the functions of the trustee under the mortgages; all tending, however, to the one conclusion, repeated at the close of each paragraph, that the bondholders themselves "are necessary parties to this suit, and this court cannot properly proceed with this cause until they are made defendants hereto and brought into this suit." The trustee was in no sense "actively resisting" the suit, but was merely dis-

claiming authority to represent the bondholders with respect to the subject matter thereof.

While the right of removal is determined by the record at the time the petition was filed, some light is reflected upon the situation at that time by subsequent proceedings in this cause. Plaintiff acquiesced in the disclaimer of the trustee, and amended its bill by designating members of each of the two groups of bondholders as representatives of their class and making them defendants in that capacity (R. 126, 127), and each of these representative groups filed an answer (R. 151, 153) concurring in the prayer for relief on condition that adequate security be required by the court before the present building was pulled down in accordance with the offer made in the bill. There was probably no necessity for joining the trustee or bondholders as parties to this cause at all, since it is a financial axiom that a new building for the Auditorium site could not be financed without retirement of the bonds or satisfactory arrangements with the bondholders; if they were joined, their interest was truly stated in the petition for removal to be on the side of the plaintiff. Every conceivable doubt on that point was eliminated by the subsequent position taken by the bondholders. In order to allay any possible compunction of the trustee as to its having discharged its full duty in the premises, the plaintiff, with its cooperation, caused notices to be mailed (R. 205, 207) to all known bondholders, apprising them that any one of their number was entitled to appear by independent counsel if not satisfied to be represented by the selected group.

Whether to save or defeat the jurisdiction of a federal court, a party will be counted on that side of the controversy where the court thinks he belongs, regardless of

his formal designation as the plaintiff or defendant on the face of the record.

Pacific Railroad Company v. *Ketchum,* 101 U. S. 289, 299.

Carson v. *Hyatt,* 118 U. S. 279, 286.

Steele v. *Culver,* 211 U. S. 26, 29.

Niles-Bement Coal Company v. *Iron Moulders' Union,* 254 U. S. 77.

If the Bank had been trustee under a mortgage on the Sears-Slater fee more might be said for the argument that it would be a necessary party to the plaintiff's controversy with the Sears-Slater defendants, though even then we think it clear from authorities already adduced that the argument would be fallacious. Since, however, plaintiff itself is the only link, if any exists, between the Bank and the owners of the Peck (Sears-Slater) fee, the remoteness of any issues which plaintiff might conceivably have with the Bank from its controversy even with the Sears-Slater defendants is manifest. We do not believe it would be possible to find any direct authority on this specific objection to the federal jurisdiction as now advanced by the petitioners, because we do not suppose such a question was ever raised. The Bank as trustee is a total stranger to the owner of the Peck fee. Any rights which it may have are merely derivative from those of the plaintiff. What effect the replacement of a building might have upon the mortgage security is a question between the plaintiff and the Bank, with which the owners of the fee have no vestige of concern. Any defendant in an ordinary suit to remove a cloud from the owner's title might as well refuse to answer the bill of complaint unless the mortgagee under a mortgage from the owner were made a codefendant.

III.

PLAINTIFF'S RIGHT TO REBUILD.

In its reply to the petition for a writ of certiorari this respondent urged (pp. 6, 20) that if the writ were granted, the entire controversy be now disposed of upon the merits, pointing out that all available evidence is in the record and there is no controversy about any essential fact, and emphasizing the disastrous consequences to it of further prolongation of the litigation in the lower courts. The petitioners in their brief have ignored these suggestions and elected to stand on the dilatory jurisdictional issues. We assume that if this court recognizes the propriety of a final adjudication, it will not be deterred by any implications in the petitioners' brief with respect to their view of the scope of the issues now properly before the court and the points to which they have seen fit to limit their argument.

As an adequate summary of "the facts averred in the pleadings and established by the evidence," we again refer to the statement of the District Judge in his opinion in this case. (R. 545-548.) While we think this alone would be enough, the gravity of plaintiff's predicament cannot be fully realized without a consideration of the evidence in somewhat greater detail.

The ground covered by the leases in controversy was, at the time of the making of the leases, at the extreme southerly limit of business development, and was in the stage of transition from residential to commercial uses. (R. 210, 217, 226, 227, 284.) The improvement of the district south of Congress street began about 1893 (R. 246), after the construction of the Congress Hotel Annex. (R. 228.) Michigan avenue is now the most promi-

nent street in the city, and is becoming more so every day, for shops, hotels, and office buildings (R. 228), being now lined with skyscrapers for many blocks on both sides of the Auditorium, and it is now the show street of the city. (R. 285.) With reference to the transformation of the district, attention is invited especially to the testimony of Edward H. Taylor (R. 210-213), Edwin C. Searles (R. 226), R. Floyd Clinch (R. 227-8, 246-7), and John Dorr Bradley (R. 285-9).

When the leases were made the Michigan avenue frontage was worth from $800 to $1,200 a front foot, and the Wabash avenue frontage from $800 to $1,600. (R. 287.) Wabash avenue was the better street. (R. 212.) The ground values stated in the Auditorium leases as a basis for figuring the rent were rather above than below the actual market values. (R. 287.) By reference to the Peck and Walker leases it may be seen that an aggregate valuation of $613,500 was placed by them upon the fees at the time the leases were made. The fair value of these fees, unimproved and unencumbered, at the time of the trial was $3,618,000. (R. 286-7.)

The general taxes have mounted from $22,707.78 in 1890 to $157,678.32 in 1925. (R. 234, 379, 381.) The rise in ground values is even greater than would be indicated by the augmented taxes, since it has been accompanied by the practically complete obliteration of building values. The original cost of the building was over $3,000,000. (R. 273.) When it was first separately assessed for purposes of taxation in 1907, its full value for taxing purposes was fixed at $1,600,000 (R. 379, 380), but in 1919 the taxing body agreed that the building had only a nominal value of $100,000 (R. 234), and it has been carried on the tax books at that figure ever since. (R. 234, 379.) The building adds nothing whatever to

the value of the property (R. 286), and the salvage would not pay for the cost of removing it. (R. 340.) It encumbers the site and is a liability rather than an asset. (R. 343.) One would rather have the land without the building on it because one would have to go to the expense of removing the present building. (R. 286.)

The Auditorium was constructed by the lessee; it was not something erected by the lessors and taken over by the lessee as part of the demised premises. The purpose of the building as disclosed by the leases, which prescribed only the general character and minimum cost of the building to be erected, was to provide security for payment of the ground rent. There is nothing in the leases about the dimensions of the building, nothing about the exterior design or interior arrangement; it might have been four stories high or twenty; all that the leases called for was "a substantial and solid fireproof building," with the specification of certain construction materials calculated to produce a building of that character. None of the leases prescribed how much of the area of the demised ground the building should occupy, or prevented the lessee from improving part of the ground and leaving the rest available for any lawful use. A modern steel skeleton structure would comply with every requirement of the leases in regard to materials and construction.

The present structure is not now a "substantial and solid fireproof building." In the language of the District Judge, "the Auditorium represents an obsolete type of construction." It is a massive building of very heavy stone masonry ten stories in height, with a heavy tower rising seven stories above the main structure. (R. 231.) The building consists of exterior bearing walls of heavy masonry from 2½ to 5 feet in thickness

(R. 291), which rest on floating foundations (R. 217, 290), with interior cast iron columns (R. 318), each of which rests on a separate floating foundation. (R. 217, 291.) The soil upon which the building stands is a soft clay which can be excavated with an ordinary shovel. (R. 290, 291.) For a full account of the foundations and substructure, reference is made to the testimony of Bernard H. Lichter, who put them in. (R. 290-294.) The massive tower near the southwest corner rests on a raft of timber and iron rail grillage 100 feet by 67 feet 2 inches (R. 217, 290-292), and a similar foundation spreading to a width of from 12 to 15 feet underlies the exterior walls. (R. 291.) There has resulted an extensive settlement in the structure, very unevenly distributed, as shown by the table of surveyor's levels (R. 221, Plffs. Ex. 38), taken at intervals almost every year since the beginning of the construction. (R. 214.) The levels in the table are those of 34 piers in the exterior walls, the location of which, as well as of certain interior stations, is shown on the photostat. (R. 215.) The table of levels, read from left to right, shows the extent of the settlement of each pier from time to time, varying from about 16½ inches at pier No. 1 to 27½ inches (R. 218) at pier No. 13 (instead of the 22 inches mentioned in the opinion of the District Judge). This settlement is still continuing (R. 218) as shown not only by this table of levels, but by the records of the surveyor employed by the owners of the Fine Arts Building adjoining the Auditorium on the north. The latter show, at a particular point in the north wall of the building (R. 225), a settlement between 1917 and 1918 amounting to ⅜ of an inch, which had increased by March, 1924, to 1¼ inches. (R. 229.) The architect in charge of the construction of the Auditorium made an allowance of only 2 inches for settlement. (R. 292.) Further excavations in the

vicinity would affect the foundations and increase the settlement (R. 321-5), and would be likely to produce a dangerous situation before there was time to meet it (R. 335) if it could be met at all.

The settlement of the exterior walls and tower has been very much greater than that of the interior columns (R. 339), and the unevenness of settlement has caused cracks in the structural parts of the building, and the fracture of various lugs and struts (R. 315, 320, 333, 339), and has induced numerous strains which are liable to create further trouble on short notice. Apart from visible fractures, the warping caused by settlement has put a twist in the cast iron and wrought iron skeleton, producing a hazard that defies any reliable solution, since there is no telling where the strain will go. (R. 344.) Investigation of the structural members, such as beams, girders, columns, etc., showed them to be overstressed through bearing a heavier load than their structural strength justified (R. 306), even if they were assumed to be of rolled steel. If of wrought iron the overstress would be much greater. (R. 306.) The load upon the soil at the wall footings is, in the opinion of qualified engineers, approximately 100 per cent more than what would be allowed by the building ordinances. (R. 312.) The overload and overstress is particularly dangerous because of the brittle character of cast iron columns and cast iron lugs. (R. 322.)

In the construction of a modern fireproof building the engineering formulas are based upon predetermined stresses and the strength of the material used, but such formulas were not complied with in the construction of the Auditorium, not having as yet been determined. (R. 319, 326.) Materials are now subjected to the most rigid tests in advance to determine their strength and carry-

ing power. (R. 325.) None of these methods were employed in the Auditorium, which was constructed just upon the eve of a revolution in the building art. (R. 319, 339, 347.) The Auditorium is a building of the old type, with exterior bearing walls supporting their own weight and that of the floors, whereas in the modern type of skeleton construction the walls are mere enclosures not bearing the weight. (R. 320.) Without attempting to abstract it, we specially ask the court's attention to the testimony of the architect, Charles E. Fox, on the character and history of the building, and the problems to which it has given rise. (R. 324 ff.)

There is no way of putting caisson foundations under the building with any assurance of success (R. 328, 340), chiefly because of the difficulty of carrying the present structure while the existing columns are taken out and the caissons are carried down to bed rock. (R. 321, 322.) In any such operation there would always be danger of collapse (R. 340), and if a breakdown started at some particular place it would be more dangerous than in case of a steel skeleton because cast iron is a very brittle metal and the parts are not securely tied together. (R. 322.) The difficulty in reconstructing the Auditorium is largely due to the original construction on floating foundations, with cast iron columns and lugs. (R. 339.)

The building contains a great deal of unprotected wood and uncovered iron and steel and is not what is now regarded as a fireproof structure. (R. 320.) Steel unprotected by fireproofing is more dangerous than wood (R. 345), and the structure is not strong enough to carry the additional load which fireproofing would entail. (R. 329.) The provisions of the building code about fireproofing apply to the remodeling or reconstruction of a building as well as to the erection of a new building when there is a change of occupancy. (R. 316-7.)

The Auditorium is also obsolete in its layout, largely because so much was sacrificed for the central theater (R. 231, 257, 286), which occupied so much interior space, and is so located, as to prevent the economic use of the surrounding space for office and hotel purposes. Upon the general demerits of the building reference is made especially to the testimony of the witnesses, R. F. Clinch (R. 231-3, 249-251), John Dorr Bradley (R. 286), and Charles E. Fox (R. 345, 351, 354-5). The results were unforeseen, but are inherent. The witnesses agree that no economic use of the space is possible; that the rooms are necessarily dark and badly arranged; that the elevators and plumbing system are out of date, and that it would be impossible to turn the building into a modern or paying investment even if it could be physically preserved.

The Association, during its entire history, has paid only one dividend of 1½ per cent. (R. 234.) Operating expenses are constantly on the increase. For a long time past the Association has saved many thousands of dollars per year through an advantageous heat, light, and power contract with the Congress Hotel (R. 234, 256), but this contract only ran to December 31, 1925, and could not be renewed except at a much higher figure. (R. 235, 256.) The reappraisal under the Studebaker leases in 1926 also entails a substantial increase in the rent. (R. 235.) No sinking fund has been set aside to meet the issue of outstanding bonds (R. 276), though required by the trust deed, except that an emergency fund of about $375,000 has been invested in securities (R. 244). A depreciation fund was set up on the books about 1919 but no money has ever been paid into it. (R. 275.) The value of the leaseholds is practically the only asset of the Association, except a little cash and furniture (R. 243, 256) and the emergency fund.

All the voluminous evidence introduced by the defendants was directed to relatively immaterial engineering questions, and did not even tend to qualify the District Judge's conclusion that the building was obsolete, financially unprofitable and prospectively unsafe and of the class of old buildings which are being torn down all over the central district of Chicago to make way for improvements of the character of the new building contemplated by the Chicago Auditorium Association. In a word, the plaintiff's case stands essentially uncontradicted on the facts, and the only questions remaining are questions of law about the right of the lessee, under the conditions shown, to the beneficial use of its property.

General Rights of a Lessee.

The ground leases involved in this proceeding were substantially alike. All were made in 1887, and ran for 99 years from August 1, 1886. Those now in controversy were afterwards extended to cover an entire term of 199 years, expiring August 1, 2085. The land was vacant, and the leases are outright grants of the use of the ground for that period. The granting clause in each of the leases is full and unrestricted. The ground is "demised and leased" to the Chicago Auditorium Association "to have and to hold the above described premises, with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine years." (R. 34, 51, 68.) The leases recite that they are made respectively "*in consideration of* the rents herein reserved and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns, to be kept, performed and fulfilled."

We postpone for the time being the discussion of these "covenants and agreements." It is sufficient to state here that they include no negative covenant prohibiting the substitution of a modern steel construction building for the present obsolete and unprofitable building. What we are now calling to the court's attention is that, except in so far as the "covenants and agreements" of the lessee do expressly or by necessary inference prohibit such substitution, there is no limitation on the lawful uses to which the lessee may put the property.

> "It would seem that on principle, apart from statute or express stipulation, the tenant is in no way restricted as regards his use of the premises, so long as this does not involve the commission of waste or the maintenance of a nuisance."
>
> 1 Tiffany, Landlord and Tenant, p. 797.

> "When the lease was executed and delivered to defendant, and was silent as to the uses to which the lessee was to devote the lands, he had the right to use the lands for any lawful purpose he desired."
>
> *Gwinn* v. *Rogers*, 92 W. Va. 533, 115 S. E. 428.

> "By virtue of the right to exclusive occupation which a tenant acquires by his lease, he 'becomes entitled to use the premises in the same manner as the owner might have done, except that he must do no act to the injury of the inheritance.' Taylor, Landlord and Tenant, Sec. 172. This right may be limited or qualified by the terms of the lease, but it is not necessary for the tenant to show any particular provision of the instrument to justify his unlimited right of use and occupation, but the landlord who denies it must point out the covenant which expressly restricts the tenant's rights."
>
> *Presby* v. *Benjamin*, 169 N. Y. 377, 62 N. E. 430.

The arena of controversy has shifted during the course of this litigation. In its earlier stages the lessors put forward as one of their major contentions the

proposition that every stone, brick and column erected on the demised premises became their property as a part of the real estate, and could by no means be removed without their consent, expressed in the lease or otherwise. They did not go so far as to contend that none of these materials of theirs could be removed in the process of repairs or minor alterations, and we doubt if they would now dispute the proposition that their property in the materials of the building is subject to whatever major rights the lessee enjoys under its leases. The length of the term for which these leases run, and the location and character of the property, necessarily imply that the lessee may meet the changing conditions, provided it does not impair the security for the rent. The ground at the time of the execution of these leases was at the edge of the central business district of a great and rapidly growing city, and is now in the very heart of that district. It was business property, suitable only for commercial use; and the parties contemplated that it would be used for the strictly commercial purposes of a hotel and office building and stores, which would financially supplement the Auditorium. It is inherent in the very nature of such leases that, so long as the security for the rent is not impaired, the lessee has authority to use the premises throughout the term for purposes that will yield a revenue and afford means for paying the rent, to say nothing of profit on the investment; and hence has authority to adapt the improvements placed on the ground to the varying conditions, especially to such radical changes as render existing improvements obsolete and unpaifitable and expectantly unsafe.

The Law of Waste.

The law of waste stood in the van of the arguments and briefs of the defendants in the District Court, but we doubt if much reliance is placed on it now, and we think it sufficient to recapitulate briefly a few of the main points and authorities on that subject.

Classical examples of waste in agricultural England were the conversion of arable land into meadow, a change in the character of the improvements, or even the erection of new improvements.

Darcy v. *Askwith*, Hob. 234.
Cole v. *Green*, 1 Lev. 309.

But afterwards it was held that there could be no waste without injury to the inheritance, and that where there was no real damage there could be no waste.

Harrow School v. *Alderton*, 2 B. & P. 86.
Jones v. *Chappell*, L. R. 20 Eq. 539.
Doherty v. *Allman*, L. R. 3 App. Cas. 709.

In any event, American courts have universally held that a strict application of the traditional English doctrines about waste was inadmissible in this country.

Pynchon v. *Stearns*, 11 Metc. 304.
Winship v. *Pitts*, 3 Paige 259.
Shine v. *Wilcox*, 1 Dev. & B. Eq. 631.
Sherrill v. *Connor*, 107 N. C. 630, 12 S. E. 588.
Moss Point Lumber Co. v. *Board*, 89 Miss. 448, 42 So. 290.

The law of waste has no relevancy to the present controversy, except as an aspect of the wider question of the use which a lessee has the right to make of the demised premises, and as this depends on the nature of the property and all the facts of the case, we proceed to

consider those questions in their larger bearings. The rights of a tenant are not deducible from an abstract definition of waste, but the existence of waste is an inverse function of the tenant's rights as determined by the circumstances of the leasing.

GROUND LEASES OF VACANT BUSINESS PROPERTY.

Lord Burlington's inheritance was not injured when his copyholder pulled down a ruinous barn, and his efforts to declare a forfeiture on the ground of waste were therefore unsuccessful.

Doe v. *Earl of Burlington*, 5 B. & Ad. 507.

If, however, a British duke let his ancestral hall to an American millionaire for five years, he would be entitled to receive the mansion at the end of the term substantially unaltered, and radical "improvements" in the building would not be excused by any proof that they had enhanced the market value of the estate. On the other hand, if the owner of a vacant lot on a business street in Chicago or New York should lease it for 999 years to a tenant who covenanted to erect on it a two-story or a ten-story building of a given value, we should not anticipate much difficulty in convincing a court that circumstances might warrant extensive changes in the character of the improvement even without the consent of a landlord who had repented of his bargain. The rights of a lessee in modern times are to be determined from all the circumstances of the leasing, and not by the application to a Chicago skyscraper of some maxim which grew out of farm leases in the days of Queen Elizabeth.

The plaintiff was confronted in the courts below by an imposing array of decisions in which even rather

trivial alterations were held to be a breach of the conditions of a lease. Most of these related to short leases of houses already built and could have no bearing upon the situation here involved. Even in the great case of *Doherty* v. *Allman,* L. R. 3 App. Cas. 709, the buildings were on the property when the lease was made. The question there decided was about the right of lessees under a lease for 999 years to convert into six dwelling houses a "store" which was on the premises at the beginning of the term, and which the lessees had covenanted to yield up in good order and repair at the end of the term. It was the lessor who appealed to equity in that case, and the court held that he was not entitled to an injunction to prevent the proposed replacement. A brief extract from the opinion of Lord Chancellor Cairns must suffice at this point:

> "The property demised, so far as it consisted of buildings, was in the form of stores, and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant—supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. * * * Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building, as it is proposed to be, has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not

almost as great an improvement as could be effected.

"If the evidence is to be believed, it is either the case now, or it may become the case, that the premises are absolutely untenantable—that no tenant can be obtained for them, or obtained for them at a rent which will produce the rent which the respondents have to pay. Repair, then, they must, for they are bound to do so by the covenant, and they have been called upon to do so. They must therefore lay out money in repairing something for which they cannot get, when it is done, an equivalent in the shape of a remunerative rent, and the court therefore for 900 years will be sentencing them, or those who succeed them, to keep the premises in a shape which will not enable them to get a remunerative rent; while, on the other hand, they would be bound to pay the substantial rent of £ 42 19s. a year to the landlord."

In an Illinois case, also, the improvements were on the land when the lease was made, but in view of their character and of the length of the term, it was held that the reconstruction of the building did not work a forfeiture of the lease.

"It can scarcely be seriously contended that it was expected that a building of the description of the one on the lots in 1874 should be maintained during the whole period of ninety-five years. In fact, the evidence shows that at the time the improvements were made thereon they were necessary to prevent its becoming unsafe as a residence and falling into decay. That injury or danger of loss to the lessor was occasioned by the change is not pretended. More than double the security which the lessor had in the old building was furnished by the improvements made on it."

Hawes v. *Favor*, 161 Ill. 440.

In America it has always been recognized that a lessee's rights must be shaped in accordance with the needs of a growing and changing society.

"The ancient doctrine of waste, if universally

> adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided. * * * In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder."
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> *Pynchon* v. *Stearns*, 11 Metc. 304.

A long-term lease of vacant land in the central business district of a growing American city of necessity imports a right on the part of the lessee to adapt the improvements to the property from time to time as occasion arises. We do not know what the lessors might say now, but their position throughout the argument in the District Court was that they owned the ground, and therefore the building; that there was no language in the leases which could be construed as authorizing the removal of the building in order to permit the erection of another; and that in the absence of such affirmative language there is an inflexible rule of law, valid at all times and places and under all circumstances, which makes it impossible for a lessee to remove a building without committing waste and forfeiting his lease. Since this is a positive rule of law, not to be relaxed according to the dictates of any rule of reason, it would be equally inviolable if the lease had been for a thousand years, or if the region in which the present theatre and hotel building stands had become a purely manufacturing district, or if the structure were already physically unsafe and not susceptible of being made safe, or if it were for any other reason a detriment to neighboring property and the general welfare.

Since we are now dealing with abstract principles alleged to be of fixed and immutable character, it may be noted that plaintiff could not divest itself of its legal obligations by breaking the covenants of its leases. The right of forfeiture is optional with the lessors, and unless they choose to exercise the option the legal liability of the lessee remains. Were we permitted to take account of realities, it might be said that the lessors would have no motive for keeping alive the liability of a lessee whose assets had been reduced to nothing, since what the lessors want is to get their property back free of the leases, so that they can themselves remove the present building and erect another on their own account. Such speculations, however, can have no legitimate place in applying fixed rules of law which speak for themselves and must always prevail regardless of time, place or circumstance; hence, if the position of the lessors is sound, the Chicago Auditorium Association is legally bound to pay the stipulated rent for the next 157 years, and at the same time to maintain upon the premises during that entire period an obsolete and expectantly unsafe structure devoid of all revenue-producing capacity or value, and this in spite of the fact that the lessee not only has the right but is obligated by the covenants of its leases to maintain upon the premises "a substantial and solid fireproof building."

No case has been adduced by any of the parties precisely similar in its facts to this, involving a controversy between landlord and tenant about the right to renew or replace buildings erected by the lessee pursuant to the covenants of a modern ground lease, for a long term of years, of property in the central business district of a large and growing city, and where the replacement of an obsolete building by a modern and suitable improvement would enhance the security of the lessors and

could only be opposed by them for the purpose of capitalizing the nuisance value of the existing structure. The principles applicable to the present litigation are, however, recognized in many of the modern decisions about the rights of a tenant in possession, whether as between lessor and lessee, or as between life tenant and remainderman. Some of these principles are well stated in a case where a tenant under a five-year lease of an existing building was held to have no right to cut through a party wall, but where the court said:

> "If the owner of a dwelling in a neighborhood which is rapidly being converted from a dwelling region into a business region lets it to a party for a long term of years, knowing that he expects to use it for business purposes, that, by implication, is permission to him to make such alterations as are necessary and usual for that purpose. And so, where a demise is made for a great number of years—say, 100 or 200—for a fair rental value of the premises, there it must be presumed that the parties intended that the tenant for years should have well-nigh unrestricted use of the premises, provided he does not reduce their rental value; for in such a case the reversion, independent of the rent, is of mere nominal value."
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> *Klie* v. *Von Broock*, 56 N. J. Eq. 18, 37 Atl. 469.

Mention may be permitted at this point of the case of *Bass* v. *Metropolitan West Side Elevated Railroad Co.*, 82 Fed. 857, which was characterized by some of the counsel in the lower court as remarkably similar to the present case. There are superficial resemblances. The lease for ninety years required the lessee to erect a building to cost not less than $50,000, and, in case of destruction by fire, to restore it upon plans and specifications to be approved by the lessor. The railroad company found it necessary to cut off a corner of the building "and in order to accomplish that end without

resort to proceedings for condemnation," procured an assignment of the leasehold estate and removed part of the building without asking the lessor's leave. Upon a bill filed by the lessor it was held that the operation of the railroad should be enjoined unless within a reasonable time the company should acquire through condemnation proceedings the right to the property of the lessor which it had appropriated. The company was guilty of a flagrant attempt to evade payment of just compensation for private property taken for public use, and that was the sole question involved in the case. The building was not obsolete; the tenant had no justification, and claimed none, for removing the corner of the building; it was not removed for the purpose of replacing it with another building, but with railroad tracks which could by no possibility have been of value to the owner of the fee. The broad language of the opinion must be read in the light of the facts.

An opinion of Judge Winslow, afterwards the distinguished Chief Justice of Wisconsin, deserves to be read in full for its luminous exposition of the relative rights of a tenant in possession and a remainderman in respect of the adaptation of improvements to changing conditions. A brewing company acquired by purchase an estate *pur auter vie* in a Milwaukee lot improved with a handsome dwelling, which the company pulled down after it had become isolated and useless by reason of the grading down of the surrounding property for business purposes.

> "The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by

factories and railway tracks, absolutely undesirable as a residence, and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by, and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless? Certainly, all the analogies are to the contrary."

Judge Winslow carefully differentiates the case from one in which the lessee of an existing building covenants to surrender it at the close of the term in the condition in which he received it, and continues:

"This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under property instructions, or for the court where, as in the present case, the question is tried by the court."

Melms v. *Pabst Brewing Co.*, 104 Wis. 7, 79 N. W. 738.

There was a case of *Smyth* v. *Carter,* 18 Beav. 78, in which Lord Romilly enjoined a lessee from pulling down an old public house and replacing it with a brewery, and let fall the remark that a landlord's wish or caprice is not subject to question. In the leading English case in the House of Lords already referred to the opinion of Lord O'Hagan deals with the earlier decision, and, after premising that the remark referred to was casual, speaks thus of the distinctions upon which all such cases must depend:

> "The case has, I think, no application to the case before your Lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. *The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion, apply at all to the case before us.* But beyond all that, if the latter words of the *dictum,* that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord *absolute arbiter* of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my Lords, I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law." (Our italics.)
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> *Doherty* v. *Allman,* L. R. 3 App. Cas. 709.

In a federal case which arose at Cincinnati, the argument turned chiefly on the construction of a covenant about the replacement of improvements "in the same condition" as before the fire by which they had been burned. There was an old mansion on the premises when the lease was made. The right of a corporation which had purchased from the original lessee to replace

the house with a 10-story hotel was sustained by the Circuit Court of Appeals for these among other reasons:

> "The premises were in the heart of a large and growing city. Already in the near vicinity a larger and more massive style of buildings was being projected. It is incredible, without more evidence to go upon, that these parties intended or wished that for 100 years this spot should remain stationary, in order to furnish to the public the semblance of a family memorial. We can attribute no weight whatever to the suggestion."
>
> *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97.

The rights of a lessee depend on facts and not merely upon the abstract relation of landlord and tenant. The assignee of a ten-year lease of a building on Broadway in the City of New York, being unable to rent it as it stood, made extensive alterations so as to convert it into a hotel. The lessor brought an action for damages, but the trial judge took the case from the jury and rendered judgment for the defendant, which is reversed on the ground that the case should have been submitted to a jury as a question of fact:

> "Whether the acts which the defendants did really caused injury, or whether they were reasonably required for the enjoyment of the premises according to the business which they carried on, cannot be determined as a question of law, but is rather a matter of fact. It depends upon the character of the building, its position upon a principal street in the city of New York, the nature and requirements of the business of the defendants as carried on in that city, or of other business to which the building might be adapted, the extent of the alterations and their effect upon the property, whether permanent or transitory."
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> *Agate* v. *Lowenbein*, 57 N. Y. 604.

Courts of equity have often refused to enforce legal rights when conditions have so changed as to render

such enforcement inequitable. Those cases, while differing in many of their facts from this, recognize certain fundamental principles which are by no means inapplicable.

In *Meux* v. *Cobley*, L. R. (1892) 2 Ch. 253, a lease of a vacant farm required the lessee to cultivate the farm in a good husbandlike manner according to the best rules of husbandry practiced in the neighborhood. The lessee converted part of the arable land into a market garden and erected greenhouses thereon. Kekewich, J., in holding that the covenant was not broken, said:

> "Nor can I with any reason exclude my own extrajudicial knowledge of the fact that this metropolis is growing, not only in houses and population, but growing, of course for that very reason, in its wants; that from year to year the demands on the land in the neighborhood of the metropolis are increasing, and that from year to year more ground must necessarily be converted into market gardens, or to other purposes, from which the inhabitants of the metropolis can be readily supplied."

Equity has found no difficulty in qualifying a trust which, by reason of unanticipated developments, has become impracticable of execution without grave detriment to the property.

Curtiss v. *Brown*, 29 Ill. 201.
Denegre v. *Walker*, 214 Ill. 113.
Cary v. *Cary*, 309 Ill. 330.
Marsh v. *Reed*, 184 Ill. 263.
Packard v. *Illinois Trust and Savings Bank*, 261 Ill. 450.

In *American Coal Company* v. *Indiana Cotton Mills*, 78 Ind. App. 115, 134 N. E. 891, land was conveyed in consideration of the erection of a factory and subject to a restrictive covenant requiring a certain area to be left

open. An injunction against building on this area was refused, the court saying:

> "The deed containing the covenant here involved was executed in February, 1849, and it is not claimed that there was any attempted violation of such covenant until in July, 1918, a period of more than 69 years, during which time history records the wonderful growth of the country, change in commercial conditions, and the phenomenal increase of industrial and manufacturing enterprises. To hold, in view of this development, that the parties to the deed intended after these years to hamper the cotton mill to its original installation, is to hold that they were wholly without vision."

In a great many cases the courts have refused to enjoin the breach of restrictive covenants which have become obsolete by reason of changes in the environment and the enhancement of values incident to the normal march of progress.

Windemere Improvement Association v. *American State Bank,* 205 Mich. 539, 172 N. W. 29.

McClure v. *Leaycraft,* 183 N. Y. 36, 75 N. E. 961.

Batchelor v. *Hinkle,* 210 N. Y. 243, 104 N. E. 629.

Page v. *Murray,* 46 N. J. Eq. 325, 19 Atl. 11.

The Massachusetts case of *McArthur* v. *Hood Rubber Co.* 221 Mass. 372, 109 N. E. 162, established, in that state at least, that a restriction which has become completely obsolete ceases to exist at all. Earlier decisions in which attempts were made to enforce the restriction affirmatively found it easier to treat the question as one of remedy, but when the issue was fairly presented the court adopted what has been called "the more logical view that when the object of a restrictive covenant can no longer be obtained, the restriction ceases to exist." (29 Harv. Law Rev. 107.)

In the recent case of *Gilmore* v. *Keogh,* 241 Ill. App. 28, a decree was affirmed which removed as a cloud on title a restrictive covenant that had become obsolete by the growth of the city converting residential into business property.

Covenants of the Leases.

There was no building on the present Auditorium site at the commencement of the time of these leases, and hence no obligation, such as is mentioned in many of the cases, to return any building *in the condition in which it was when received,* but the contention of the defendants has been that plaintiff is required, by the express or implied terms of its leases, to erect a building and surrender that identical building at the end of the term *in the condition in which it was when completed.*

The covenants of the five leases are substantially alike, and one (R. 34) will serve for all. It seems unnecessary to repeat them in detail. No negative covenant will be found forbidding the replacement of the building, and no affirmative covenant, we confidently assert, from which any such negative covenant can be implied.

1. *Covenants to Be Construed as Security for the Rent.*

In the first place, the covenants about the building must be interpreted in the light of the purpose for which they were made, which was security for payment of the rent. Ground leases of business property are a familiar and recognized form of conservative investment. The leases involved in the present controversy specified the value of the land, fixed the annual rent at a certain percentage thereof subject to subsequent revaluations, and required the lessee to erect a building of a stated minimum cost and keep it in repair. Taxes, assessments, in-

surance premiums and some other charges were to be paid by the lessee, so that the rent would yield a net percentage on the ground values, and there was given to the lessor by each lease "a valid and first lien upon the leasehold interest," and also upon "any and all buildings, improvements, and other property on said premises belonging to" the lessee "*as security for the payment of said rent.*" (R. 42.) If the lessors had themselves erected the building, they might conceivably claim, though we think ineffectually, to have some legitimate interest in it other than as security for their investment, but in view of the provisions of the leases and the circumstances surrounding their execution, nothing is involved except an investment with certain provisions for safeguarding the security. The only suggestion in the entire record of any different motives is in a question volunteered by Judge Wilkerson, who asked Mr. Clinch, president of plaintiff, whether Mr. Willing, in the negotiations prior to the bringing of suit, said anything about wanting a monument to the city to stand, or put his opposition to the removal of the building on any ground of public interest. Mr. Clinch answered, "Absolutely not." (R. 254.) The judge asked Mr. Clinch to state as fully as he could the reasons given by Mr. Willing for his position that the old building could not be torn down and a new one put up in its place. Mr. Clinch said he told Mr. Willing

> "that we thought we should be allowed to put up a better building and they would have a better security by having a building there with caissons, a twenty-two story building, rather than the building we have got there, and he said, 'Well, if you do, we think we should get more rent.' I said, 'Well, you made your bargain there for rent. You agreed to lease it for so much. You leased it to us for 199 years and we will continue to pay you rent, and during the interval we will furnish you with any se-

curity any court says is fair and right, until the new building is up, and then you have got better security.' He said, 'Well, that is all right, but if you get more money out of it we think we are entitled to more rent, and you put up that building and you have got to agree with us before you take that building down. It takes two to make a bargain.' "

We note in passing that this offer and rejection of security was evidently overlooked by counsel for the petitioners when they assert in their brief (p. 9) that

"in none of the conferences did President Clinch mention the giving of security to protect the landlords during the proposed periods of demolition of the present building, and of the construction of his projected new one."

In the Cincinnati case already cited the lease contained a covenant on the part of the lessee that if improvements, repairs, or changes were made on the property the old improvements should be replaced by new ones of equal value and fully as substantial. This clause was analogous to the covenants in the Auditorium leases respecting the erection of a substantial and solid fireproof building of a certain cost. The following language of the court indicates the purpose of such covenants:

"Now, without going further, we think it clear that the main object of these stipulations concerning demolition, repairs, and reconstructions was to maintain constantly the security for rent and the restoration of the property in an unimpaired condition at the end of the lease. They were dealing with the security of values. A stipulation that this insurance money should only be used to replace the old by the same kind of buildings would be inconsistent with the dominating provision that, if the lessee should replace old improvements by new, the latter should be of equal value and fully as substantial as the old. And the rule in such conditions is that all parts of the instrument shall be so read as to harmonize with each other."

Pike v. *Cincinnati Realty Co.* 179 Fed. 97.

In *Hawes* v. *Favor,* 161 Ill. 440, where a complainant in equity was held not to have forfeited her 95-year lease by reconstructing and adding to an old house on the premises, one persuasive reason given by the court for its decision was stated as follows:

> "The manifest object of the parties in putting these covenants in the lease was to protect the lessor against loss resulting from permitting the property to go into decay or to be removed from the premises. * * * That injury or danger of loss to the lessor was occasioned by the change is not pretended. More than double the security which the lessor had in the old building was furnished by the improvements made on it."

It is obvious from these principles, and from common knowledge, that any provisions of the leases with respect to the improvements to be erected or maintained on the land must be interpreted in the light of the primary purpose of affording adequate security for payment of the rent.

Judge Wilkerson's curiosity on this point (R., 253-5) was due to covert suggestions, made at the trial and still hinted in the present brief, that the Auditorium was a public monument built without expectation of pecuniary profit. Investors were no doubt attracted by the plan to furnish a large assembly hall which would be a credit to the city, but plaintiff was organized under the Illinois statute as a corporation for pecuniary profit, and the investors no doubt hoped that the enterprise would be a financial success. Whatever motives may have animated the promoters whose funds went to enable the lessee to erect the building, it is at least clear from the present record that the original lessors, to whose rights alone the defendants have succeeded, made no financial sacrifices whatever. The evidence is undisputed that the valuations placed on the land in the Peck and Walker leases

as a basis for figuring the initial rent were above rather than below the market. (R. 287.) In fact, both fees were very shortly afterwards sold at a substantial profit, as appears from the statement of facts at the beginning of this brief, to which we refer.

The agreed value of the Walker fee upon which the rent was computed in 1887 was $420,000, and this fee was sold March 17, 1890, to Henry J. Willing for $475,000. The agreed valuation of the Peck fee was $193,500, and this fee was sold February 2, 1889, for $232,000. Any notion that these purchasers, either in buying the property or in extending the leases, were actuated by altruistic motives is as gratuitous as it is fantastic. There is no indication that Henry J. Willing ever regarded his purchase otherwise than as an investment, and the evidence above cited shows affirmatively that this is the only aspect of the property in which his son Mark Skinner Willing is interested. When the Walker leases were extended by Henry J. Willing the annual rent then payable thereunder until the year 1896 was $21,000, after which the amount was uncertain, depending on the valuation to be made in that year. The Peck fee was purchased by a Boston trustee and a Connecticut investor, and anyone who affirms that these New England gentlemen came to Chicago to modify their lease out of a philanthropic regard for that metropolis is assuming a heavy burden of proof. The annual rent then payable to them until 1896 was $11,610, and instead of an uncertain sum to be determined in that year and thereafter by a revaluation, they also accepted a certainty of $14,000 for the remainder of the term. Both lessors evidently believed that they were improving their immediate position and converting speculative possibilities into commercial certainties.

If any of the stockholders had the good of the city at heart, as no doubt many did, we do not find them or their successors asking to have an obsolete building perpetuated at their expense. If anybody was actuated by public spirit to the exclusion of commercial motives, it was not the original lessors, nor their present successors in interest, nor yet any intervening owners of the fee, and we are not advised how the present owners of the fee expect their vicarious patriotism to redound to the benefit of the original investors or their successors.

The suggestion on page 6 of petitioners' brief that "newcomers unconcerned with the civic aspirations which fostered the Auditorium enterprise have recently acquired control of its capital stock," is not based upon the record. The references are to the cross examination of Mr. Clinch at pages 245 and 259. He testified that he had acquired approximately 1,800 shares of the capital stock (out of a total of 20,000), but denied that he controlled other shares or that there was any syndicate in which he had a part or any trust agreement or voting trust. His only control over any other stock rested upon the confidence of the majority of the stockholders which he enjoyed as president of the corporation.

2. *Covenants to Be Construed in Accordance with Public Policy.*

If any covenants in these leases ineluctably imported an agreement that this building on commercial property must be maintained as originally built, no matter how obsolete, ruinous, dangerous and unprofitable, and no matter how alien to its environment, for approximately two hundred years, we think that, as so interpreted, they would be contrary to public policy and void. Public policy as a ground for nullifying a covenant alto-

gether is undoubtedly an argument of last resort, but it enters constantly into the determination of the just and true meaning of covenants. There are, however, many familiar instances in which the courts have, from considerations of public policy, overruled the intentions of the parties, however explicitly insisted upon in their contract. Often the principles thus established are so familiar that their origin is apt to be overlooked.

A conveyance, no matter how absolute in form, will be construed as a mortgage when actually given to secure a debt, and every device of the parties to exclude or clog the equity of redemption is absolutely void.

Peugh v. *Davis,* 96 U. S. 332.
Brick v. *Brick,* 98 U. S. 514.

A stipulation in a contract relieving a carrier from liability for his own negligence is contrary to public policy and void.

New York Central R. R. Co. v. *Lockwood,* 17 Wall. 357.
B. & O. R. Co. v. *Voigt,* 176 U. S. 514.

Agreements in restraint of trade are frequently held void because against public policy.

3 Williston on Contracts, Secs. 1638, 1639.
Gibbs v. *Consolidated Gas Co.,* 130 U. S. 396, 409.
Fowle v. *Park,* 131 U. S. 88, 96.
Dr. Miles Medical Co. v. *Park,* 220 U. S. 373, 406.

Restraints upon the alienation of property conveyed in fee are rejected by some courts altogether on the view that *any* restriction is repugnant to the grant, but by other courts only when unreasonable and contrary to public policy.

Gray v. *Blanchard,* 8 Pick. 284.
Cowell v. *Colorado Springs Co.* 100 U. S. 55.

Where the latter rule prevails, a restraint upon alienation during the life of the grantee of the fee is held to be unreasonable and void.

Pritchard v. *Bailey,* 113 N. C. 525, 18 S. E. 668.
Harkness v. *Lisle,* 132 Ky. 767, 117 S. W. 264.
Cropper v. *Bowles,* 150 Ky. 393, 150 S. W. 380.
O'Connor v. *Thetford,* 174 S. W. (Tex.) 680.

If sound public policy will not permit the fee title to be tied up for the remainder of one person's life, no reason is apparent why it should permit all beneficial use of the property to be destroyed for many generations by an agreement which can be of no legitimate advantage to anybody. If the language of these leases was so specific as to be susceptible of no other interpretation than that contended for on behalf of the lessors, we think the leases would to that extent be so contrary to sound public policy as to be void under the authority and persuasive reasoning of the great case of *Egerton* v. *Brownlow,* 4 H. L. Cas. 1, universally accepted as establishing those limitations which must be imposed in the public interest upon the right of private contract and the use of private property. It is no radical or revolutionary doctrine which this leading decision, pronounced in the year 1853, has established in Anglo-Saxon jurisprudence. Space is lacking for extended quotation from the opinions of the several Lord Justices, but we invite special attention to some of the language of the Lord Chief Baron on page 144, of Lord Lyndhurst on page 160, and of Lord Truro on page 197 of the official report of the case.

Public policy is a living principle, which, while its operation upon situations of frequent recurrence has been standardized by settled rules, cannot be restricted

to cases where an exact precedent is to be found in the books.

> "It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."
>
> *Pope Mfg. Company* v. *Gormully*, 144 U. S. 224, 233.

Whether a restraint on the use of property is consistent with public policy depends on the standards of the time and not upon those of past ages. We have to deal with a great and growing city, not with a static community; with Chicago, and not with an English countryside. What was lawful a hundred years ago may be contrary to policy of the present day.

The foregoing decisions with respect to agreements held to be against public policy and therefore void are not adduced with the idea that these leases do contain covenants which require the lessee to maintain for the next 150 years an obsolete, financially impossible and prospectively unsafe building; but that in view of the illegality on grounds of public policy of any such covenants had they been written into the leases, this court will not now read them into the leases by implication from the ordinary covenants for maintenance and repair.

3. *Covenants to Be Construed in Accordance with Reason and Justice.*

The parties to a contract or other written instrument will not be deemed to have been actuated by absurd or unlawful intentions unless those intentions are set forth in unequivocal language. Doubtful phraseology will be interpreted in the light of the conditions and circumstances under which a contract was made, and with due regard to the reasonable and lawful objects which honest men are presumed to have had in view.

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract."
>
> *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota,* 121 Fed. 609, 611.
>
> *A. Leschen & Sons Rope Co.* v. *Mayflower Co.,* 173 Fed. 855, 857.

The foregoing language was used in both of those cases by Mr. Justice Sanborn, who also said in a later case:

> "Where the language of a contract is contradictory, obscure, or ambiguous, or its meaning is doubtful, so that the agreement is fairly susceptible of two constructions, the more natural, probable, and reasonable interpretation should be adopted."
>
> *Barnsdall Oil Co.* v. *Leahy,* 195 Fed. 731, 734.

> "It is a rule of interpretation that where a contract is open to two constructions, by one of which

it would be lawful and the other unlawful, the former must be adopted."

Hobbs v. *McLean,* 117 U. S. 567, 576.

"When an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

Per Field, J., in *Noonan* v. *Bradley,* 9 Wall. 394, 407 (citing 6 M. & W. 612).

Courts, in the construction of written instruments, look to the subject matter, the surrounding circumstances, the situation of the parties, and the objects to be attained, and are not limited to a mechanical examination of the four corners of the instrument.

Nash v. *Towne,* 5 Wall. 689.

Merriam v. *United States,* 107 U. S. 437.

Merrill-Ruckgaber Co. v. *United States,* 241 U. S. 387.

The terms of a grant or lease are to be construed in favor of the grantee or lessee, especially as against any restrictions upon that free use of property which is safeguarded by the settled public policy of this country.

Peirce v. *New York Dock Co.* 265 Fed. 148, 155.

Hawes v. *Favor,* 161 Ill. 440.

Negative covenants restricting the free use of property will not be implied, but every intendment is against such limitations.

Hutchinson v. *Ulrich,* 145 Ill. 336, 342.

Van Duyn v. *Chase,* 149 Iowa, 222, 128 N. W. 300.

In *Doherty* v. *Allman,* L. R. 3 App. Cas. 709, the Lord Chancellor said:

"Your Lordships will observe that the contract

is an affirmative one. There are no negative terms in it. There are no terms obliging the lessee negatively by way of contract not to use these premises for any purpose but stores, and not to make any alteration which would render them suitable for any purpose but that of storing corn or for goods of the same kind."

4. *Implication from Affirmative Provisions of Leases.*

Manifestly, these leases are not to be treated as functioning *in vacuo,* but must be viewed in their relations to the circumstances existing when they were executed. They contemplate and expressly provide for the construction of a "substantial and solid fireproof building" of a minimum cost, and with a general specification of certain fireproof materials—no more. The building was on the edge of the central business district of a great and growing city, subject to the radical changes characteristic of such property, and there are *no negative covenants* or provisions in the leases to divest the lessee of such free control over the property and its uses as would alone justify the obligation to pay the stipulated rental for the ground. The lessors were and are entitled to have the payment of this ground rental assured to them throughout the term of the leases by a "substantial and solid fireproof building" on the premises. Conversely, the lessee is entitled to have the benefit of such a building. While reluctant to wring subtle meanings out of words which were perhaps used rather artlessly, we proceed to draw such inferences from the phraseology of the leases as a comparison of their provisions will fairly yield.

The lessee is required to erect a building, and to pay a ground rental based on the value of "the demised premises exclusive of improvements placed thereon by said lessee, *its successors or assigns.*" Some improve-

ments to be erected in future by successors or assigns of the lessee are in contemplation of the parties. Again, there is throughout an indiscriminate and interchangeable use of the words "building" and "buildings," coupled with "improvements," and at the end of the term there is to be an appraisal of "any and all *building* or *buildings* and any and all *improvements* that are *then* situated and standing upon said premises." We do not imagine for a moment that the parties to these leases weighed every word to discover what remote meanings it might be susceptible of; what we do claim is that if the lessors undertake by a process of verbal analysis and forced implication to extract from covenants to repair and other language of the leases a meaning that would defeat the ends of obvious justice, we are at least equally entitled to draw any inferences which point to an opposite conclusion. In doing so we shall not lack authoritative sanction. In long-term leases where it would be oppressive and unconscionable to require obsolete buildings to be maintained for generations, the courts have been astute to discover, even in the language of the lease itself, the permission to do what is obviously demanded by reason and good conscience.

In *Meux* v. *Cobley*, L. R. (1892) 2 Ch. 253, where the lessee was charged with wasting the inheritance by changing the character of the premises and placing new structures thereon, Kekewich, J., delivering the opinion, said on page 260:

> "I would refer to one other provision, which is, that the lessee is bound at the end of the term to yield up in good condition, not only the buildings which he was bound by prior covenant to keep in repair, but also all fixtures, improvements, and things which were then or at any time during the term should or might be fixed to or erected or set up upon any part of the demised premises. So that

> the lease contemplates there being additions in the way of fixtures which might be also improvements, and which are to be delivered up."

In *Doe* v. *Jones*, 4 B. & Ad. 126, where the tenant converted part of a dwelling into a shop and made other changes in premises leased for 40 years, the lessee had covenanted to repair and keep in repair the demised premises, "together with such buildings, improvements and additions whatsoever as at any time during the said term should be erected, set up, or made by him." Counsel for the landlord argued that "the parties cannot have contemplated as an improvement the doing of acts which the law considers waste," but Parke, J., said:

> "That does not apply to a lease like this, which contemplated 'improvements and additions' and only provides against nonrepair, which is permissive waste. Under such a lease can it be said that a valuable house was to be kept in precisely the same condition for forty years? I think the nonsuit was right."

Taunton, J., added:

> "This case is the same as if there had been an express contract for the liberty to make improvements, which at common law would have been waste: here the contract is implied."

In *Jones* v. *Chappell*, L. R. 20 Eq. 539, Sir George Jessel expressed the opinion that a covenant to keep all future buildings and erections in repair was "almost an implied license to erect buildings."

In *Doherty* v. *Allman*, L. R. 3 App. Cas. 709, there was a covenant to keep all buildings and improvements in good repair and condition, and Lord Chancellor Cairns, after referring, in the discursive manner which seems to prevail in the House of Lords, to the length of the terms and the character of the improvements, said in conclusion:

> "I should be sorry to say that, in a lease for such

> a term as this, the construction to be given to a covenant of this kind might not be held to be such as that the conversion of the storehouse under the circumstances into dwelling houses would be or might be an 'improvement' within the meaning of that term."

It is not our contention that these cases are exactly like the one at bar, but the same underlying principles of interpretation are applicable. In each of the Auditorium leases there is a covenant by the lessee to pay taxes on the premises, "or upon any building, addition or improvement of any kind which may after the date of these presents and before the expiration of the term of this lease be erected, made or placed thereon," and there are other provisions about the buildings or improvements on the premises at the end of the term. These might not be sufficient to dispense with the terms of a negative covenant restricting the replacement of old buildings, had any such covenant been incorporated in the leases, and provided it could be reconciled with public policy; but they are such as could not have been used if the parties had intended to restrict the lessee in the legitimate use and enjoyment of its leasehold estate.

5. *Alleged Effect of Covenants to Repair and Rebuild.*

Stress was laid in the District Court on two provisions of the leases, one general and the other special. In the first place, each lease requires the lessee to "keep the buildings situated upon said demised premises and all appurtenances belonging thereto in good repair and in a safe and secure condition," and to "keep all rooms in said building in good, safe, clean and tenantable condition and repair during the entire term of this lease." That is a general provision. Then there is a special requirement that if "said buildings" or any part thereof

be destroyed or damaged by fire, the lessee shall rebuild or repair the same "upon the same plan as before the fire happened, or such other plans as by the party of the first part shall be approved in writing." These are the only covenants about repairing or rebuilding.

The special covenant about rebuilding refers to nothing that has occurred. There has been no fire. It was invoked for the sole purpose of placing by inference or innuendo an unreasonable and inequitable construction upon other portions of the lease to which it has no literal application whatsoever. In view of the principles to which courts resort in ascertaining the true meaning of contracts, this clause might well be passed without further notice, but we do not think that even if the question were of rebuilding after a fire it would bear the construction contended for. The argument was, that rebuilding on the "same plan" meant rebuilding in accordance with the identical plans and specifications originally used. The ordinary phrase employed in contracts to express that meaning is "plans and specifications." The only "plan" found in the leases is that of a substantial and solid fireproof building, constructed of brick, etc., and "such other materials as are usual in fireproof buildings." So far as these leases disclose, the lessors were not at all concerned with exterior elevations or interior layout, with height, or breadth, or depth,—only with minimum cost and substantial construction. Any building which complied with the original specifications would satisfy the requirements with respect to rebuilding after a fire.

> "In support of the position taken by the trustee, his counsel point to and chiefly rely upon the final stipulation in the foregoing paragraph, wherein it is provided that if any insurance money should be collected, it 'shall be applied to replace said improvements upon said property in the same condi-

> tion as before said damage occurred'; and they say that 'the same condition' means the same forms of buildings and structures as before the fire. We do not so interpret this language. It seems to us to refer to the state, quality, or predicament of the buildings, etc., rather than to the structures themselves. This construction harmonizes with the other stipulations of the contract, while the other can only with difficulty be reconciled with them."
>
> *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97.

We think that the meaning we ascribe to the phrase "same plan" in the Auditorium leases "harmonizes with the other stipulations in the contract" about the kind of building to be erected on the premises, and also with common sense and common honesty, and that it is the only meaning which does; but even if the clause had in unambiguous terms required the exact duplication of any building destroyed by fire, it could not determine the lessee's rights when there has been no fire.

The other covenant, to keep the buildings and appurtenances "in good repair and in a safe and secure condition," occasioned much debate and difference of opinion in the court below, but unless our recollection is inaccurate, counsel for the different defendants all did reach the conclusion, by whatever devious routes, that the covenant to keep the buildings in good repair and in a safe and secure condition included a covenant on the part of the lessee never to pull down the Auditorium for any purpose or under any conditions, and that this implied negative covenant was as absolute as any proposition of Euclid. This argument requires such a construction to be put upon the words "repair" and "maintain" as would spell out of them a covenant, affirmative in form but negative in effect, forbidding the erection of any new building upon these premises, even though the present building should have become, not only worth-

less, but dangerous and incapable of being held together by any process of repair. The argument not only demands this judicial construction, but means that *one* building and only *one* building may be built upon the premises, and that this one building must be repaired and maintained until the end of the leases unless it is burned down; and even in case of fire the contention is that this one building must be replaced by another one building exactly on the same architectural plans and specifications, unless, and unless only, the lessors approve in writing other plans for this one building. Each lease repeatedly and indiscriminately refers not to the *one* building insisted upon by appellees, but to buildings and improvements on the premises demised by *that* lease, with no reference to leases of adjacent lots. With language like this in the leases, could any chancellor, seeking to construe them as a whole according to the reasonable intentions presumed to have been in the minds of the parties, adopt a construction imposing upon the use of valuable property unreasonable and unjust limitations, profitable to nobody unless as an instrument of exaction, but damaging to the lessee, the neighborhood and the community, and contrary to the plain dictates of public policy?

Witnesses may differ about the physical possibility of retaining the outer shell of heavy mason work by inserting caisson foundations underneath and reconstructing the interior; but about the worthlessness of such a reconstructed building as a source of income there is no difference of opinion at all. What the lessee undertook to erect was a substantial and solid fireproof building. What it covenanted to keep in good repair and in a safe and secure condition was, in the case of each separate lease, "the building situated upon said demised premises." Owing to unforeseen contingencies it is now un-

able to keep the present building in good repair and in a safe and secure condition as a solid and substantial fireproof building or otherwise. It does not clearly appear just what the petitioners now claim as to the lessee's right to make the building comply with the covenants of the leases through alterations of the most radical character, provided a semblance of identiy is preserved by retention of the outer masonry shell. But any sacrifice of the formal tokens of identity while a new improvement is being constructed conforming beyond all question to the strictest requirements of the leases, is, according to the version urged in the court below, by no means to be tolerated, and this though no *express* negative covenant prohibits the substitution of a new "substantial and solid fireproof building" for one which has ceased to be substantial and solid. If, as plaintiff's witnesses say, it is physically impossible to make this building solid and substantial by the expenditure of any amount of money, the triumphant retort was that impossibility affords no excuse for failure to perform an express covenant; that if plaintiff has agreed to keep this same building in good repair, and if this same building can no longer be kept by it in repair, the misfortune is its own and it cannot evade the consequences by erecting another building which would meet every requirement of the leases.

Conditions and Form of Relief.

In the District Court, the plaintiff was charged with having damned its own case by offering to do equity, and this view even prevailed with Judge Wilkerson, as is evident from the following language which he used at the conclusion of his opinion (R. 562):

> "The offer to give bond for the construction of the new building, and the offer to reform the provisions

> of the leases with reference to purchase of the building at the expiration of the terms, do not aid the plaintiff. Rather they emphasize the fundamental infirmity in its appeal for equitable relief. If plaintiff is right in its construction of the leases, it is entitled to tear down the old building and to put up a new one, without giving bond and without submitting to a modification of the leases. If plaintiff's contention is wrong, a court of equity cannot relieve against the obligations of the contracts, in the absence of some element of fraud, accident, or mistake. Equity does not have power to make contracts for the parties which they have not made for themselves."

This view implies that every right of parties to a lease must be found expressed in its terms, and that the right of plaintiff to rebuild, if it exists at all, must be spelled out of some affirmative language of the leases now in question. We think we have abundantly shown the unsoundness of this interpretation of the rights of parties. The extent of a lessee's right to improve the demised property or to alter the improvements thereon from time to time is determined by the condition of the premises at the time of leasing, the length of the term, the nature of the property and all the surrounding circumstances, unless that right is defined by the lease itself. If these leases in terms gave the lessee the right to replace the first building with a new one but were silent about interim security, and if the building on the premises was the principal security for the rent, we think we should find the lessors insisting, in court or out, upon some protection before their main security was destroyed. Whether they would be entitled to such relief is not a question now in issue. The right of a lessee to use and improve the demised property depends on a variety of facts, chief of which is the effect which such improvement would have upon the lessors' security. The right might not exist if its exercise would necessarily impair

the security for payment of the rent, and it might not be exercisable except upon conditions which would effectually prevent such impairment. Plaintiff certainly did not prejudice its case by anticipating any possible apprehensions of the defendants or by offering to do whatever is just and equitable in the premises. If the court shall deem the defendants entitled to any security, the plaintiff has offered to furnish it, as was done in *Hyman* v. *Rose*, L. R. (1912) App. Cas. 623, and the court will be at liberty to accept the offer "without too curiously inquiring," as Lord Chancellor Loreburn said in that case (p. 632) "whether the offer is in excess of what the court would exact."

The other criticism of plaintiff's offer to do equity relates to the purchase by the lessors of the improvements at the end of the term, as provided in each of the leases. (R. 45.) The lessors protest that they cannot be forced to pay for a building more costly than the original structure now standing on the premises, but they are scandalized by plaintiff's suggestion of releasing them from any such obligation. The leases do not limit the cost, but the contention was that the lessors knew what kind of a building was going to be put up and covenanted with respect to it only. Counsel did not say whether plaintiff could have increased or could now increase the height of the building by the erection of additional stories. It is to be noted, with reference to the purchase price at the end of the term, that each of the Walker leases contains the following provision (R. 45, 62):

> "In making said appraisement of the value of said improvements, the appraisers or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said im-

> provements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant."

The same requirement in substance appears in the Peck lease (R. 82) and the Studebaker leases. (R. 101.) If it is in fact a vested right of the lessors to have on the premises at the end of the terms a ruin which will cost them nothing because its appraised value will be nothing, the plaintiff is prepared and has offered to go just as far in allaying their misgivings as the court may think equitable. Even if this process did import a modification of the leases by waiver of an obligation of the lessors, that fact would present no obstacle to equitable relief.

> "It is within the powers of a court of equity to refuse to direct the specific performance of a contract unless the complainant will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."
>
> 25 R. C. L. 344.

The necessary implication is, that if plaintiff offers to waive a provision of the contract which, if strictly enforced, is claimed to work injustice, the court can decree specific performance of the agreement as so modified, as it could impose a like condition if no such offer were made; in other words, the argument that to grant this relief would be to make a new contract for the parties is merely specious and unsound.

In *Davis* v. *Hone* 2 Sch. & Lef. 340, Lord Redesdale expressed himself as follows:

> "The court ought not, I think, to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant, in consequence of the change of circumstances.

> But because the plaintiffs ought not to have the covenant performed literally, they are not to lose their property entirely. This court will execute the covenant, according to a conscientious modification of it, to do justice as far as circumstances will permit. It has happened, by lapse of time and change of circumstances, that it would be harsh and unjust to require execution of the covenant, specifically in the very terms; but it is the advantage of a court of equity that it can modify the demands of parties according to justice."

It is a recognized and regular practice of courts of equity to grant affirmative relief upon equitable terms even to the extent of enforcing a contract with some mitigation of its literal provisions. For instance, in the case of *Willard* v. *Tayloe,* 8 Wall. 557, this court said:

> "It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis* v. *Hone,* 2 Sch. & Lef. 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."

And in the earlier case of *Mechanic's Bank* v. *Lynn,* 1 Pet. 376:

> "The court ought not to decree performance according to the letter when, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires."

In *City of La Follette* v. *La Follette Water Company,* 252 Fed. 762, Judge (now Mr. Justice) Sanford, in an opinion adopted by the Circuit Court of Appeals, said:

> "In cases where hardship develops in the enforce-

ment of the contract due to changed conditions, the court may properly, as a condition of granting to the plaintiff the equitable relief of specific performance, require it to assent to such equitable modifications of the contract as are just and proper."

Other federal cases announce the same principles.

Wright v. *Vocalion Organ Co.* 148 Fed. 209.

Cronen v. *Moore,* 210 Fed. 239.

Prof. Roscoe Pound, commenting on this feature of the case, says:

"In such a decree as that in *City of LaFollette* v. *LaFollette Water Co.* where Judge Sanford made the plaintiff accept certain modifications of the contract as a condition of specific performance, we are on surer ground. If the plaintiff will not consent, he may have his remedy at law on the contract as made. If he desires equitable relief, he may be required to do equity by accepting reasonable modifications in view of supervening events which would make performance according to the unmodified terms a hardship. These cases are significant of a return to the classical conception of the chancellor's powers and the manner of their exercise, and are in welcome contrast to the inflexible mechanical methods of a generation ago, which then seemed to import a decadence of equity."

33 Harvard Law Review, 437.

If plaintiff went farther than was necessary in conditioning its prayer for relief upon the giving of security for completion of a new building, the relief to which it may have been entitled without bond would certainly not be denied with a bond. As to payment for the building at the end of the term, it has not expressed and would not be justified at the present time in expressing an opinion on the question whether any waiver of the provisions in the leases is necessary or equitable. That would be for the court to decide, either now or when the question is presented for determination in the proper forum.

The lessee can never hope to recoup one-half of its losses even if it should not be required to waive any of its existing rights under its leases.

Counsel for certain of the defendants cited authorities in the court below from which they argued that any decree in this cause would impose on the court administrative duties for an indefinite period. Nothing in the present case resembles the conditions under which, in the cases so quoted, the courts refused to assume perpetual supervision of the acts of the parties. Modern courts of equity do not leave an applicant remediless merely because they cannot divest themselves of jurisdiction by the entry of a single decree disposing of all present and future issues by the expiration of the then current term of court. In *Union Pacific Railway Company* v. *Chicago, Rock Island & Pacific Railway Company*, 163 U. S. 564, it was urged as an objection to the specific enforcement of a railway operating contract (page 600) that "equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment and technical knowledge." That view is rejected, however, since the decree was deemed complete in itself, and the retention of jurisdiction to supervise its execution was a matter of detail. This court said at page 600:

> "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated'; and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to sat-

> isfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. Sec. 111."

In *Joy* v. *St. Louis*, 138 U. S. 1, the decree (p. 16) defined the terms and conditions upon which one railroad was entitled under a certain agreement to use the tracks of another, and enjoined the latter from preventing such use. In affirming the decree this court said that the refusal of specific performance in *Rutland Marble Company* v. *Ripley*, 10 Wall. 339, was for the reason, among others, that "the court could make no decree which would end the controversy, and the case would have to remain in the court forever." The opinion then proceeds (p. 47):

> "In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

In *City of La Follette* v. *La Follette Water Co.* 252 Fed. 762, already cited, the opinion adopted by the Circuit Court of Appeals, contained this language (p. 774):

> "It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract, or advancement in science shall disclose new methods of improving the water which

> can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect."

Other pertinent cases indicative of the broad powers exercised by courts of equity in the enforcement of continuing contracts are:

Texas Co. v. *Central Fuel Oil Co.* 194 Fed. 1, 14.

Great Lakes Co. v. *Scranton Coal Co.* 239 Fed. 603.

American Smelting Co. v. *Bunker Hill Mining Co.* 248 Fed. 172, 182.

Kearns-Gorsuch Co. v. *Hartford-Fairmont Co.* 1 Fed. (2d) 318.

In the relief necessary to do justice in the present case there is nothing beyond the ordinary competency of a court of equity. It is not even subject to the doubts attending applications for specific performance. When the right of plaintiff to improve its property is once determined and the defendants are barred from interference with the exercise of its rights, it will then, and not before, be in a position to proceed with the preparation of plans and arrangements for putting them into effect. The court, if security is deemed necessary, can retain jurisdiction to determine its character and approve it when offered, and can reserve jurisdiction so as to give the lessors opportunity to object to the building plans or their execution as not conformable to the requirements of the leases or the terms of the decree. We are not ap-

prehensive about such objections after the primary right to build has been settled, since the obstacles interposed by the defendant do not relate to the character of any building which the plaintiff might erect, but go to the right of the plaintiff to build at all without previous increase of the ground rentals. We do not suppose that this court will prescribe the provisions of a decree in minute detail.

The petitioners manifest much formal concern about the "cross easements" which "have become appurtenant to each fee" (Brief, p. 37) and which they think would have to be taken care of in any decree that might have been entered in the separable controversy of the Sears-Slater defendants which warranted the removal of this cause to a federal court. Such rights, if they exist, can be protected by supplemental decree when detailed plans are submitted for approval if the court chooses to reserve jurisdiction for that purpose, but we might stop to inquire, if this were the proper time and place, just what cross easements the petitioners think they have in an obsolete and worthless building which no longer subserves any of the purposes for which it was erected. No such easement can be spelled out of the leases themselves, which are mute on the subject. It arose, if at all, merely by force of the erection of a single building on the property of the lessors with their common consent, and even if its original duration were on any hypothesis measurable by that of the then existing leasehold estates, these have since been so modified by the lessors that the Auditorium leases now expire at dates a century apart. The alleged easement must either last for all time, or else it must expire with the useful life of the building. As was said with respect to a single dwelling built upon adjacent lots:

"Upon principle, the extent of the burden imposed

must be limited by the presumed intention of the parties, having regard to the relations and dependencies of the two estates, and the changes which may reasonably be expected to take place. It is to be considered that the necessity which lies at the foundation of the right arises from the existing relations of artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it. There can be by implication no mutual easement of perpetual support, applicable to future structures."

Pierce v. *Dyer*, 109 Mass. 374.

Other decisions, some of them relating to party walls, but all illustrative of the same principle, are:

Moore v. *Shoemaker*, 10 App. Cas. (D. C.) 6.
Partridge v. *Gilbert*, 15 N. Y. 601.
Heartt v. *Kruger*, 121 N. Y. 386; 24 N. E. 841.
Bonney v. *Greenwood*, 96 Me. 335; 52 Atl. 786.
Antomarchi v. *Russell*, 63 Ala. 359.
Jackson v. *Bruns*, 129 Iowa 616; 106 N. W. 1.
Odd Fellows Assn. v. *Hegele*, 24 Ore 16; 32 Pac. 679.

We do not suppose this court would concern itself at the present time with details of the interior arrangement or interconnection of the edifice with which the plaintiff expects to replace the Auditorium Building, nor do we anticipate any difficulty about the building plans after the ability of the lessors to block any improvement until their demands are complied with shall be definitely negatived by decree of the proper court.

There was nothing novel or exceptional in the method which this court followed in *Sharon* v. *Tucker* upon reversal of a judgment for the defendant where the record discloses no material dispute about the facts which would support a judgment for the plaintiff.

Fort Scott v. *Hickman,* 112 U. S. 150.
Pullman Car Company v. *Metropolitan Ry Co.* 157 U. S. 94, 112.
Meyer v. *Richards,* 163 U. S. 385, 415.
Fulton v. *Krull,* 200 N. Y. 105, 93 N. E. 494.
Miller v. *Staggs,* 266 Mo. 339, 181 S. W. 116.

We earnestly request this court to dispose of the merits of the case now, and pray that the court will, in pursuance of the prayer of the bill, direct the entry of a decree which will enable the plaintiff to have the beneficial use of its property.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561.

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES, AND MARK SKINNER WILLING,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

SUPPLEMENTAL AUTHORITIES FOR RESPONDENT.

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SUPPLEMENTAL AUTHORITIES FOR RESPONDENT.

These Respondents respectfully submit the following additional authorities in answer to the citations on pages 15 and 16 of the Petitioners' reply brief with respect to the policy of this Court in dealing with the merits of a case pending therein on writ of certiorari.

Delk v. St. Louis, etc., R. R. Co., 220 U. S. 580 (Opinion by Mr. Justice Harlan)

"As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this Court has the entire record before it, with the power to review the action of that court as well as direct such disposition of the case as that court might have done." Since, however, the District Court's judgment was right, all that was necessary was to affirm it.

Camp v. Gress, 250 U. S. 308 (Opinion of Mr. Justice Brandeis)

Judgment against three defendants was affirmed by the Court of Appeals. On certiorari a plea of one defendant to the venue was held good and the District Court was directed to dismiss as to him. Judgment was affirmed as to the others, whose objection to the measure of damages was overruled, but the opinion says: "The contention must be examined, as the whole case is here on certiorari."

Cole v. Ralph, 252 U. S. 280 (Opinion by Mr. Justice Vandevanter)

Adverse possession, without discovery of a vein of ore, is held on certiorari to be no defense. Judgment of the Court of Appeals is reversed and that of the District Court affirmed, since a jury had found there was no discovery. The court, however, first examines a number of other defenses, and declares the applicable law, rejecting them all. If any had been sustained, the cause would evidently have been remanded with directions to proceed accordingly. The Court said:

"In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better, inasmuch as counsel have united in presenting to us all questions thought to arise on the record, and the litigation already has covered a considerable period."

(The precise date of filing the bill is not shown in any report of the case, but it was after September 24, 1914, and the case was argued in the Supreme Court December 8, 1919. The Auditorium bill was filed February 15, 1923.)

Kendall v. Ewert, 259 U. S. 139 (Opinion by Mr. Justice Clarke)

On appeal, *Cole v. Ralph* is cited to show that the whole cause is before the Court for disposition, and not merely the grounds on which the Court of Appeals based its decision. The District Court had dismissed the bill, but the evidence is reviewed, the law declared, judgment reversed, and the cause remanded to the District Court with direction to enter a decree for plaintiff as outlined in the opinion and mandate.

Gerdes v. Lustgarten, 266 U. S. 321 (Opinion by Mr. Justice Sanford)

The District Court refused to discharge a bankrupt, but did not find whether a financial statement he had made was false. The Court of Appeals held him entitled to his discharge since the creditor was not justified in relying on the statement whether it was false or not. On certiorari, this court held that the creditor was entitled to rely on the statement, and the judg-

ments of both courts were reversed, with a mandate to the District Court to ascertain whether the statement was false or not, and to grant or refuse the discharge accordingly. *Cole v. Ralph* is cited as an authority for the following:

> "We may now either determine these questions upon an independent examination of the testimony, or remand the case for further proceedings in order that they may be determined in the lower court."

McCardle vs. Indianapolis Water Co., 272 U. S. 400 (Opinion by Mr. Justice Butler)

The majority opinion, and Mr. Justice Brandeis in the minority opinion, both cited *Cole v. Ralph* to the effect that the court, having the evidence before it, has power to examine the facts and determine, in the light of the legal principles announced, whether they justify the decree. The majority opinion holds that they do, while the minority considers that the better practice would be to remand to the lower court to pass on the facts *in the light of the legal principles announced by the Court.*

Respectfully submitted,

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